IN THE SUPREME COURT OF FLORIDA

RAYMOND KOON,

Appellant,

v. CASE NO. 63,322

STATE OF FLORIDA,

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On March 20, 1979, Special Agent Bowron of the United States Secret Service arrested Joseph Edward Dino on Counterfeiting charges. (R 567) As a result of this arrest, Mr. Dino agreed to co-operate with the government (R 568) and implicated one Charles Williams. Mr. Williams was arrested on May 24, 1979 and also charged with counterfeiting. (R 569) Based upon statements given to him by Messrs. Dino and Williams, (R 574-575; 578) Agent Bowron arrested the Appellant on May 31, 1979 and charged him with possession and delivery of counterfeit currency. (R 575; 579)

The Appellant was indicted on Counterfeiting charges by a Federal Grand Jury on August 15, 1979. (R 582-583) The government's case against the Appellant never went to trial because the Appellant murdered Joseph Edward Dino (R 126) and Charles Williams refused to testify. (R 586) As the Appellant points out on page one of his brief, he pleaded guilty to killing Joseph Dino in Federal Court based upon federal charges concerning injuring or intimidating federal witnesses.

As Appellant further points out, he was thereafter indicted by a State Grand Jury in Collier County, Florida on February 16, 1982 for the murder of Joseph Dino. (R 1) Trial was held on November 16, 1982 through November 22, 1982. The Appellant was found guilty of First Degree Murder and appeals to this court.

The testimony at the state trial revealed that on November 21, 1979 at approximately 8:30 p.m. at Big Daddy's Lounge in

Hialeah, (R 640-642; 769) the Appellant became involved in a fight with Joseph Dino. (R 644; 770) Dino was heard calling for help. (R 642; 771) After the fight, the Appellant's nephew, Joseph Lester Koon, helped the Appellant put Joseph Dino in Joseph Koon's automobile. (R 645; 773) The two abducted him. (R 777)

Joseph Koon drove down Highway 41 westbound toward Naples, (R 779) and then into the Everglades. (R 780) During the ride, the Appellant told Joseph Koon to stop the car. Everyone got out of the car and the Appellant took a shotgun out of the trunk of the car and ordered Joseph Dino into the trunk. (R 775-776) Joseph Koon didn't want Dino in the trunk and Dino refused to get into the trunk. (R 776) Dino was afraid for his life and made the statement to Appellant, "You're going to kill me, aren't you?" (R 776)

The three got back into the car and headed into the Everglades of Collier County. (R 789) The trip was directed by the Appellant. (R 780) In a remote part of the Everglades the Appellant and Dino got out of the car. Joseph Koon was told by his uncle to stay in the car, that he and Dino had to talk. (R 781) The two walked into the glades. (R 782)

Approximately eight to ten minutes later, Joseph Koon heard his uncle's shotgun discharge. (R. 782) He jumped out of the car and ran to where his uncle was. His uncle was standing beside a lake and Dino was in the water. Joseph Koon tried to pull Dino out of the water when his uncle ordered him to "turn

him loose. He's dead. I watched his head explode." (R 782-783; 883)

In response to further questions from the prosecutor, Joseph Koon responded: "Well, he said, 'Dead men can't tell no tales.' Mr. Dino couldn't testify against him now." (R 783)

Subsequent to the murder the Appellant confessed to his mother-in-law that, "I God damned sure did [kill Dino]. And I'd do it again if I had to." (R 917) He also told George Burton that he had to kill Dino because "he was going to [turn] State's evidence on him." (R 927)

ARGUMENT

ISSUE I

THE APPELLANT WAS NOT PLACED TWICE IN JEOPARDY BY HIS MURDER CONVICTION.

The Appellant claims that his conviction in the Federal District Court of violating 18 U.S.C. §241, by virtue of the Fifth Amendment to the United States Constitution and Article I, section 9 of the Florida Constitution, should have barred his conviction and sentence for First Degree Murder by a Florida state court. This contention is unfounded.

As far back as 1922, the United States Supreme Court held that there is no double jeopardy bar to successive state and federal prosecutions and punishments for the same criminal conduct. United States v. Lanza, 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed. 314 (1922). This continues to be the law in the federal system, (see e.g., United States v. Hayes, 589 F.2d 811 (5th Cir. 1979)) as well as the law in Florida. Booth v. State, 436 So.2d 36 (Fla. 1983).

The fact that the Appellant was the subject of successive federal and state prosecution for the murder of Joseph Dino (R 1) was perfectly legal and, as this court pointed out in Booth, supra, not in violation of the double jeopardy clauses of either the State or Federal Constitution.

ISSUE II

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR CONTINUANCE.

Fla. R. Crim. P. 3.190(g)(2) provides that "The court on motion of the State or a defendant or upon its own motion may in its discretion for good cause shown grant a continuance."

"In reviewing discretionary rulings, the test for the appellate court is whether the trial court abused its discretion." Crum v. State, 398 So.2d 810, 811 (Fla. 1981). The Appellant argues that the trial court abused its discretion in denying his motion for a second continuance filed the day before trial. (R 112)

On October 8, 1982, five weeks before the trial was scheduled, the trial court granted a defense motion for a thirty (30) day continuance in order to give the defense more time to run further psychological and physiological tests on the Appellant. (R 186, 272) Although the trial court believed the tests requested by the defense should have been done "several months ago" (R 186), he granted the continuance anyway.

On the morning of trial, November 16, 1982, the defense argued for another continuance based upon the fact that he had not yet received all of the results of the further examinations. (R 287-288) As the Appellant has pointed out in his brief, his defense was Voluntary Intoxication. The defense had, at the least, all of the time from Appellant's indictment for First

Degree Murder on February 16, 1982 (R. 1) until the time of trial eleven months later to prepare its defense. The time period included the five week continuance granted at the last minute by the trial judge on October 8, 1982.

Under the cicumstances of this case it can hardly be said that the trial court abused its discretion or prejudiced the defense by declining to grant another continuance.

ISSUE III

THE TRIAL COURT DID NOT ERR IN EXAMINING FOR CAUSE JUROR ALICE ASTLING.

Appellant next claims that the lower court erred in excusing for cause juror Alice Astling. The record supports the lower court's action. When asked if she could consider rendering the imposition of the death penalty, she replied that ". . . I wouldn't want that responsibility." (R 475) The prosecutor then asked:

> ". . .are you reconcilably [sic] commited to vote against the death penalty regardless of the circumstances?" (R. 475)

The juror noted that she had been thinking about it and answered:

> "Right now, I don't think I could." (R. 475)

Further questioning ensued:

> "MR. TAYLOR: Any philosophical or moral problem with standing in judgment of your fellow man?
>
> MRS. ASTLING: Some." (R. 478)

When the prosecutor moved to excuse her and Appellant objected, the court questioned the juror:

> "THE COURT: All right. In the second phase of the trial, would that mean regardless of facts and circumstances involved in this case, that you are, so to speak, going to say or recommend or vote to recommend to the Court that the death penalty not be imposed? (R. 482)
>
> MRS. ASTLING: Yes, I think that's --
>
> THE COURT: So that would be your answer in the second phase? You would almost automatically recommend to me through your

vote that it should be imposed? Is that right?

MRS. ASTLING: It would influence me, yes." (R 484)

She was then excused without further objection or complaint by Appellant. (R 484) Since Appellant made no further attempt to rehabilitate the prospective juror as qualified, he presumably agreed with the trial court that excusal was appropriate. Appellant may not acquiesce to a ruling and then complain on appeal. Lucas v. State, 376 So.2d 1149. (Fla. 1979)

This Court has in the past ruled that the failure of an accused to timely and properly object prior to a juror's excusal will preclude appellate review. Maggard v. State, 399 So.2d 973 (Fla. 1981); Rose v. State, 425 So.2d 521 (Fla. 1982).

ISSUE IV

THERE WAS NO ERROR IN PERMITTING THE APPELLANT'S WIFE TO TESTIFY AGAINST HIM.

Section 90.507, Florida Statutes (1981) provides that:

> A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if he . . . voluntarily discloses or makes the communication when he does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of he matter or communication.

In Donaldson v. State, 369 So.2d 691 (Fla. 1st DCA 1979), the court had occasion to consider the Husband-Wife privilege. In that case, the court opined that "although confidential communication between husband and wife are privileged, the mere admission of such communication at trial is not reversible error unless there is a showing that but for the admission of such evidence a different result would have been reached at the trial. Cornelius v. State, 49 So.2d 332 (Fla. 1950) . . . His wife's testimony in that respect was merely cumulative and as such is not grounds for reversal on appeal where there is other competent substantial evidence in the record sufficient to sustain the verdict of guilt. Montalvo v. State, 154 So.2d 713 (Fla. 3d DCA 1963); Urga v. State, 155 So.2d 719 (Fla.2d DCA 1963)." Id. at 694.

Section 90.507 when applied to the facts of this case dissolves any Husband-Wife privilege the Appellant may have legitimately asserted at trial. The testimony at trial reveals

that the Appellant confessed to murdering Joe Dino to his mother-in-law, Lois Purvis, (R 915-917); to George Burton (R 927-929); and to Joseph Lester Koon (R 783).

These disclosures were voluntarily made under circumstances bereft of any reasonable expectation of privacy. In Katz v. United States, 387 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), Mr. Justice Harlan in his concurring opinion found a twofold requirement before one could be said to have a "reasonale expectation of privacy." "First, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." 387 U.S. at 361, 19 L.Ed.2d at 588.

Even assuming the Appellant met the first of these two requirements under Katz when he made his confession to his mother-in-law, his step-son and nephew, he didn't meet the second. A murder confession to these types of people is not one society will agree the murderer may reasonably expect to be kept private and free from disclosure.

As a result, under Section 90.507, the Appellant by his two confessions waived his right o claim the Husband-Wife privilege under Section 90.509.

Even assuming arguendo that he could legitimately raise the claim of privilege, there has been no showing that but for the testimony of his wife a different result would have been reached at trial. See Donaldson v. State, supra. Sub judice, there was

substantial competent evidence adduced at trial to sustain the verdict regardless of the wife's testimony.

If there was error in admitting the testimony of the Appellant's wife, which there was not, such error was harmless beyond a reasonable doubt in the light of the other substantial evidence introduced at trial. Section 924.33, Florida Statutes (1982)

ISSUE V

THE ADEQUACY OF REPRESENTATION OF COUNSEL MAY NOT BE RAISED FOR THE FIRST TIME ON DIRECT APPEAL.

"The adequacy of representation of counsel [may] not be raised for the first time on direct appeal. State v. Barber, 301 So.2d 7 (Fla. 1974). This rule is applicable to capital cases. Gibson v. State, 351 So.2d 948 (Fla. 1977), cert. denied, 435 U.S. 1004 (1978)." Perri v. State, ___ So.2d ___ (Fla. 1983), 8 F.L.W. 398 Case No. 57,142, opinion filed September 29, 1983.

Those claims Appellant is making in this issue should have been brought before the trial court by way of a motion for post-conviction relief prsuant to Fla. R. Crim. P. 3.850.

ISSUE VI

THE TRIAL COURT'S REFUSAL TO ALLOW APPELLANT TO REOPEN HIS CASE CONSTITUTED A PROPER EXERCISE OF THAT COURT'S DISCRETION.

After Appellant discharged his attorney and elected to represent himself, the trial court asked if Appellant desired to make his own final argument. Appellant replied as follows:

> "How about me just taking over and starting from the beginning like I get for him to do? Witness out there he didn't call, very important eyewitness." (R. 1074)

Prior to making his closing argument, Appellant requested two weeks postponement to get his "stuff" together and alleged that defense counsel had not properly presented his case. (R. 1091) Appellant now explains that these statements constituted a request to reopen his case to present additional evidence. Appellant also contends that the trial court's denial of this request constitutes reversible error.

The question of whether or not a party is entitled to reopen its case to present additional evidence is committed to the sound discretion of the trial court, and the trial court's ruling on such a matter should not be disturbed on appeal absent a clear showing of abuse of discretion. Stewart v. State, 420 So.2d 862 (Fla. 1982); Pitts v. State, 195 So.2d 104 (Fla. 1966). The record sub judice does not support Appellant's contention that the trial court abused its discretion in denying his request to reopen. The record reflects that Appellant was disturbed

because his trial counsel had not called an eyewitness to the kidnapping to describe who was there. (R. 1983) Appellant does not give the court the name of the witness, indicate whether or not his witness is available, or divulge the substance of the testimony he is expected to give. In other words, nothing in this record suggests that an uncalled eyewitness [1] even existed.

Ordinarily an appellate court cannot consider the propriety of the trial court's ruling excluding testimony where the defense does not proffer to show what the excluded testimony would have been. Lowery v. State, 402 So.2d 1287 (Fla. 5th DCA 1981); Whitted v, State, 362 So.2d 688 (Fla. 1978); Gaines v. State, 244 So.2d 478 (Fla. 4th DCA 1970). Appellee would submit that Appellant's failure to proffer the evidence he hoped to adduce precludes review of this issue. Certainly, based on the highly speculative information given to the trial court or the lack thereof, it cannot be said that the trial court abused its discretion in refusing to allow Appellant to reopen his case. Compare Steffanos v. State, 80 Fla. 309, 86 So. 204 (Fla. 1920).

Appellant suggests in his brief that the trial court had a duty to inquire further into the nature of the evidence Appellant desired to present citing, Sylvia v. State, 210 So.2d 286 (Fla.

1/ During its case in chief, the State presented the testimony of Jose Fernandez, who had observed the victim's abduction. (R. 640-656) Witness Fernandez was able to give only a general description of the perpetrators of the kidnapping. (R. 646)

3d DCA 1968), cert. denied 393 U.S. 981 (1968). Appellant provided no basis for further inquiry by the trial court. The fact that Appellant was, at this juncture of the trial, representing himself did not entitle him to special consideration. United States v. Chaney, 662 F.2d 1148 (5th Cir. Unit B 1981); Birl v. Estelle, 660 F.2d 592 (5th Cir. 1981). Appellant was properly required to comply with relevant rules of procedural and substantive law. Id. at 660 F.2d 593. In summary, the trial court did not err in refusing Appellant's request to reopen his case because Appellant failed to demonstrate a valid reason for granting his request. Appellent's argument on this point must fail.

ISSUE VII - SENTENCING

ARGUMENT I

THE TRIAL COURT DID NOT ERR IN FAILING TO CONTINUE THE SENTENCING PORTION OF APPELLANT'S TRIAL OR IN NOT APPOINTING NEW COUNSEL.

Under our system of jurisprudence a criminal defendant is entitled to be represented by counsel before he can be convicted. Gideon v. Wainwright, 372 U.S. 355, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) and Argersinger v. Hamlin, 407 U.S. 25, 98 S.Ct. 2006, 32 L.Ed. 530 (1972). One part of a defendant's Sixth Amendment right to assistance of counsel is the right to secure counsel of one's choosing. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) and Crooker v. California, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958). However, the right to counsel of one's own choice is not an absolute right. Gandy v. State of Alabama, 569 F.2d 1318 (5th Cir. 1978). The right to counsel of one's choice cannot be insisted on in a way that will obstruct orderly judicial procedure and deprive courts of the exercise of their inherent powers to control the administration of justice. United States v. Burton, 584 F.2d 485 (D.C. Cir. 1978) and United States v. Gipson, 695 F.2d 109 (11th Cir. 1982), cert. denied 75 L.Ed.2d 455 (1983).

Sub judice, Appellant had counsel, Mr. McDonnell to represent him during the guilt portion of the trial. After the defense rested, Appellant sought to discharge his attorney. (R1066)

Appellant was informed he had to either proceed with new counsel or represent himself; he insisted he no longer wanted Mr. McDonnell. (R 1068, 1073) The closing argument was done by Appellant, and despite protestations that he would not use Mr. McDonnell, Appellant conferred with counsel during the argument. (R 1124) Mr. McDonnell also, at Appellant's request, had objections to the jury instructions. (R 1147)

After the guilty verdict on Friday, Appellant was told the sentencing hearing would be held on the following Monday. (R 1151) The court urged the defendant to utilize Mr. McDopnnell's services and court was recessed with Appellant giving the impression he would use Mr. McDonnell in the penalty phase. (R 1151-1152) However, Appellant did not want the services of Mr. McDonnell and asked other counsel be appointed. (R 1161-1162)

The defendant knew the sentencing hearing would be on Monday and did not arrange to have his own attorney. The trial judge offered him the services of the Public Defender, more particularly an assistant who was intimately familiar with Appellant's case. (R 1163-1166 Mr. Osteen's services were also refused. Instead, Appellant made the following obstructionist statement:

> THE DEFENDANT: No sir. Your Honor, this trial is nothing but political motives. I refuse to be a stepping stone for you and Mr. Neil and I request to be sent back to my penthouse apartment back over in the jail, please, because I don't intend to participate any further in this kangaroo court. (R 1166)

Notwithstanding this statement, the court had the Public Defender, Mr. Osteen, available to assist the defendant. (R 1175)

Appellant had from Friday to Monday to obtain private counsel of his choosing to represent him at the sentencing hearing. When he did not, the court offered him the public defender and made Mr. Osteen available for conferences. The trial court did its utmost to protect Appellant's rights. The fact that Appellant chose to obstruct and thwart the ends of justice does not demonstrate error in the trial court's denial of a continuance.

ARGUMENT II

THERE WAS NO ERROR IN THE INTRODUCTION OF EVIDENCE, ARGUMENT OR JURY INSTRUCTION CONCERNING APPELLANT'S CONVICTION FOR AGGRAVATED ASSAULT.

For the sake of brevity and clarity and to avoid needless repitition, the three issues raised on this point will be argued together in this brief.

All of the evidence in this record indicates Appellant was convicted in 1971 of assault with intent to commit murder. It was argued and the Appellant was convicted and placed on 5 years probation for assault with intent to commit murder. (R 1191,144) The pre-sentence investigation report indicates a conviction on that offense as well as o four counts of aggravated assault. (R 160)

Contrary to Appellant's assertion, Elledge v. State, 346 So.2d 998 (Fla. 1977) and Morgan v. State, 415 So.2d 6 (Fla. 1982) are applicable to this situation. These two cases allow for not only the admission into evidence of documentation of a conviction but also testimony concerning the circumstances of that conviction. In this instance, the prior volent felony was proven via a judgment and sentence and argued to the jury.

Error has not been demonstrated.

ISSUE VIII

ARGUMENT I

INEFFECTIVE ASSISTANCE OF COUNSEL CANNOT BE RAISED ON DIRECT APPEAL.

In Issue V, supra, Appellant raised the adequacy of his representation during the guilt phase. He now questions representation, which he refused, during the sentencing phase. It must again be stated this is not an appropriate issue for direct appeal. Perri v. State, supra; Gibson v. State, supra and State v. Barker, supra. Appellant's remedy is via 3.850 motion.

ARGUMENT II

THE TRIAL COURT DID NOT ERR IN DENYING A CONTINUANCE.

This is the same matter which was addressed under Issue VII above. No useful purpose would be served by rehashing the facts and circumstances preceeding the sentencing hearing.

ARGUMENT III

THE SENTENCE OF DEATH WAS NOT BASED ON PORTIONS OF THE PRESENTENCE REPORT THAT WERE CONTROVERTED

Prior to pronouncement of sentence on January 28, 2983, Appellant pointed out to the court what he considered to be lies in the presentence investigation report. (R 1217-1227) Included among the lies were those portions of the report which touched on the factual circumstances surrounding Appellant's prior violent felonies. Thus, Appellant now in essence argues the judge could

not have used these felonies as an aggravating circumstance because he says they are lies.

Appellant's argument on this issue overlooks one very important factor. Even if there are some factor discrepancies in the presentence report, it does not change the ultimate fact - Appellant was adjudicated and sentenced on these charges. The judgments and sentences were sufficient evidence to support the trial court's findings. Morgan v. State, supra.

ARGUMENT IV

THE TRIAL COURT DID NOT ERR IN FINDING NO MITIGATING CIRCUMSTANCES.

Appellant was given the opportunity to have either Mr. McDonnell or Mr. Osteen, both of whom were familiar with his case, to repreeent him at his penalty hearing. When he chose neither, he had every opportunity to present mitigating evidence in his own behalf. He chose not to prseent any mitigating evidence to the jury. There was no mention at the hearing, nor during Mr. Osteen's statement on Appellant's behalf at sentencing concerning medical or alcoholic mitigating evidence. The court cannot be held in error for failing to find that which was never presented. Additionally, there is nothing in the record suggesting or supporting mitigation.

ARGUMENT V

THE CAPITAL FELONY WAS BOTH COLD, CALCULATED AND PREMEDITATED, AND HEINOUS, ATROCIOUS AND CRUEL.

Recently, in Routly v. State, ___So.2d ___ (Fla. 1983, 8 F.L.W. 388, Case No. 60,066, Opinion filed September 22, 1983), this Court had the opportunity to address a murder where both Section 92.141(5)(b), Florida Statutes and Section 921.144(5)(i), Florida Statues were applicable. It was reiterated that this factor applies, although not exclusively to execution style or contract killings. McCray v. State, 416 So.2d 804, 807 (Fla. 1983). Sub judice, Appellant, knowing the victim was a witness against him in federal court, and a companion lured the victim to the parking lot of a lounge. He was forcibly placed in a red automobile and taken to an everglades rockpit. He was killed by a shotgun blast to the head and brain.

Appellee submits in the words of the prosecutor, this was "a well planned, methodically cold execution. (R 1194) See Combs v. State, 403 So.2d 448 (Fla. 1981).

The Court in Combs v. State, supra held a murder could be heinous, atrocious and cruel as well as cold, calculated and premeditated. The heinous aspect relates to the manner in which the crime was done, i.e., causing the victim prolonged agony. That factor is present here. In addition to luring the victim to the parking lot, he was beaten senseless and locked into the car. Joseph Dino, the victim, was told to get in the trunk of the car and he asked if he was going to be killed. He was put in the

car and driven to the rockpit and taken out. It is clear that the victim was aware of impending death. A factor which attributes to the atrocity of the crime. Knight v. State, 338 So.2d 201 (Fla. 1976).

ISSUE IX

THERE HAS BEEN NO
DENIAL OF DUE PROCESS.

As his parting shot, Appellant has asserted in this issue that the cumulative effect of the preceeding arguments of error combined to deny him "due process."

It is well established that where assignments of error are grouped in the brief of counsel, if one assignment fails, they all fail. Smithie v. State, 101 So.2d 276, 88 Fla. 70 (Fla. 1924). A single assignment attacking a plurality of rulings upon the admission or rejection of evidence is unavailing, unless all such rulings are erroneous. Williams v. State, 50 So. 749, 58 Fla. 138 (Fla. 1909); Cobb v. State, 126 So. 281 (Fla. 1930); Mercer v. State, 92 So. 535 (Fla. 1922).

Therefore, it is respectfully submitted that if any one of the thirteen (13) rulings of the lower court attached herein under this point on appeal is correct, Appellant's entire point must fail.

The Appellee would argue in this point that, as the preceeding arguments of Appellee demonstrate, all of the Appellant's issues on appeal have failed. consequently, this issue must also fail. The Appellant received the full measure of due process guaranteed him under the State and Federal Constitutions.

CONCLUSION

Based on the foregoing reasons, arguments and citations, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Thomas S. Biggs, Jr., Esquire, Suite 202, Congress Center, 849 7th Avenue, South, Naples, Florida 33940 on this the 28th day of October, 1983.

Of Counsel for Appellee