IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,343

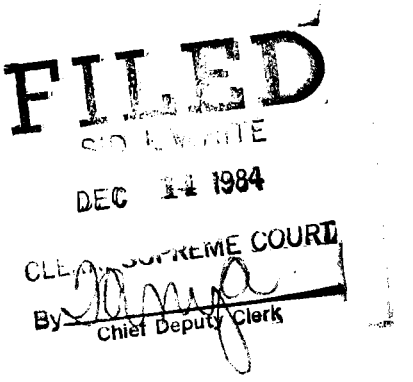
ASKARI ABDULLAH MUHAMMAD,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.



AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

BRIEF OF APPELLEE, THE STATE OF FLORIDA

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PREFACE

The Appellee, the State of Florida, was the prosecution in the court below. The Appellant, Askari Abdullah Muhammad, formerly, Thomas Knight, was the defendant in the court below. In this brief, the parties will be referred to as they appear before the trial court.

The following symbols are used in this brief:

(R) For the Record on Appeal herein, bound under separate cover, previously transmitted herein consisting of Pages R1-R479.

Additionally, the State has received a potpourri of transcripts, including five different supplemental records. The principle set of transcripts is in eight volumes, the first three of which were received as a belated supplemental record. These first three volumes contain the voir dire of the jury panel. Said transcripts will therefore not be referred to herein.

Volumes IV to VI of said principle set of transcripts is the trial herein and is consecutively numbered 1 to 510 and will be referred to by the page designation T1-T510.

Volume VII of said transcripts is the "penalty phase" and is numbered 1-60 and will be referred to by the page designation TT1-TT60.

Volume VIII of said transcripts is the trial court's announcement of its sentence and is numbered 1-7 and will be referral to by the designation TTT1-TTT7.

The five supplemental records will have to be referred to by the date of each transcript and pagination therein, since they are not numbered in any order, See, Fla.R.App.P. 9.200(d).

I

STATEMENT OF THE CASE

The Defendant, Askari Abdullah Muhammad, was charged by indictment with one count of First Degree Murder, arising from the killing of a prison guard while he was incarcerated and awaiting execution for the brutal killings of the Gans couple in Knight v. State, 338 So.2d 201 (Fla. 1976). See, R1-R2; TT17-TT29.

The Defendant's Statement of the Case is substantially correct, but the Defendant has made significant omissions. The State also rejects any improper or unwarranted inferences or argument therein.

In particular, relevant to the present appeal, the Defendant omits reference to the fact that on September 3, 1982, he filed a sworn document entitled, "Motion to Withdraw Notice of Intent to Claim Defense of Insanity." See, R420-R421. In said sworn Motion the Defendant unequivocally states:

> "1. The defendant does not intend to rely on the defense of insanity in this cause.

> 2. The Defendant does not intend to show insanity by witnesses in this cause."
>
> Id.

Additionally, while represented by counsel at the hearing upon the issue of competency, the trial court expressed concern that it could not comply with the requirements of Rule 3.210 Florida Rules of Criminal Procedure because less than two "experts" had examined the Defendant. See, May 17, 1982, at p.12. In response to the trial court's concern, defense counsel stated:

> "I think we've complied with the rules and I think there's one expert."
>
> Id.

Additionally, defense counsel argued to the trial court that appointing additional experts would not serve any purpose (in view of the Defendant's recalcitrance) and defense counsel offered the report of Dr. "Ahmann" (sic) as evidence of the Defendant's competency to stand trial. Id., at pp.13. Dr. Amin's report was also filed on May 18, 1982, as a "Joint Exhibit." See, R368-R370.

When the Defendant represented himself before the trial court just before trial, there was also an extensive inquiry relating to both the Defendant's competency and his request

to represent himself. See, June 7, 1982 at pp. 5-36. The Defendant argued to the trial court that he wasn't saying that the was incompetent, but rather the trial court must inquire as to his competency as a matter of law:

> "THE COURT: Okay. Let's go to the incompetency thing. Do you believe at this point there's a question about your mental competency to stand trial?
>
> MR. MUHAMMAD: As a matter of law, Your Honor, I should be examined to determine whether I am competent to proceed to trial. This is not to say that I am incompetent to proceed to trial, but I am only saying as a matter of law, I believe that the Court has a duty to determine my competency to proceed to trial."
>
> Id., at p.11.

The Defendant also indicated to the trial court that the sole basis for his complaint as to the report of Dr. Amin finding him competent was that he didn't know that Amin was making such a determination. Id., at p.9.

The Defendant has also omitted the fact that during the present trial the Defendant skillfully conducted more than three hours of cross-examination of the only major eyewitness to the present killing. See, T49-T74; T79-T147. During said cross-examination the Defendant impeached the witness with a deposition and with his intense questioning caused the witness to admit errors of judgment and in his

estimates of the physical setting. Id. The Defendant also conducted an extensive cross-examination of every witness and put on six witnesses of his own. See, T16-T165, T175-T208 (Owens); T214-T229 (Brower); T258-T278 (McCauley); T293-T312 (Padget); T352-T369 (Dr. Clark); T371-T430 (defense witnesses). The Defendant also presented a twenty-seven (27) page closing argument. See, T455-T480. Before trial, the Defendant himself filed more than twenty substantial sworn Motions and other pleadings. See, R49-R50 (Demand for Discovery); R52 (Request for copy of Indictment); R55-R57 (Motion for Injunction); R59 (Motion to Proceed Pro Se); R174-R175 (Motion for Investigator); R179 (Motion to Dismiss); R390 (Motion for Completed Record); R392 (Motion to Use Law Library); 394 (Motion for Investigators); R396-R397 (Motion for Assistance of Counsel); R418-R419 (Demand for Discovery); R420 (Withdrawal of Insanity Defense); R424 (Motion for Reporter to Transcribe Notes); R427 (Motion for Continuance); R431 (Affidavit for Change of Venue); R435-R436 (Motion for Change of Venue); R439 (Discovery). Finally, after trial the Defendant also filed an extensive sworn Motion for a New Trial and a Notice of Appeal. See, R452-R454; R486. The Defendant's Motion for a new trial catalogues virtually every ruling of the trial court, but does not raise a single issue as to either an insanity defense or the Defendant's competence. Id.

II

QUESTIONS PRESENTED

FIRST ISSUE

WHETHER THE DEFENDANT HAS PRESENTED ANY ERROR IN THE TRIAL COURT'S FINDING THAT THE DEFENDANT WAS COMPETENT AND IN THE TRIAL COURT'S PERMITTING THE DEFENDANT TO REPRESENT HIMSELF. (DEFENDANT'S "ISSUE I" AND "ISSUE II").

SECOND ISSUE

WHETHER THE DEFENDANT HAS PRESENTED ANY ERROR IN THE REFUSAL OF THE TRIAL COURT TO PERMIT THE DEFENDANT TO PRESENT AN INSANITY DEFENSE. (DEFENDANT'S "ISSUE III").

THIRD ISSUE

WHETHER THE DEATH PENALTY IS APPROPRIATE HEREIN? (DEFENDANT'S "ISSUE IV" AND "ISSUE V").

III

ARGUMENT

FIRST ISSUE

THE DEFENDANT HAS FAILED TO PRESENT ANY ERROR IN THE TRIAL COURT'S FINDING THAT THE DEFENDANT WAS COMPETENT AND IN THE TRIAL COURT'S PERMITTING THE DEFENDANT TO REPRESENT HIMSELF.

For the first time on appeal, through new counsel, the Defendant argues that the trial Court should not have relied upon the report of the Defendant's expert Dr. Amin, who found him competent. The Defendant also complains for the first time on appeal that Amin's report is defective and that the Defendant should have been examined by more than one expert. Finally, the Defendant asserts that Amin's finding of competency should be rejected because the Defendant did not know that Amin was examining the Defendant for competency. With respect to representing himself, the Defendant through new counsel reasons that although the Defendant may have been shown to be competent to stand trial and assist his counsel, there is (the present attorney argues), no evidence on this record that the Defendant was "competent" to represent himself. The Defendant's present counsel states that the trial court "abruptly ended its [Faretta] inquiry..." Defendant's Brief at p.27. The Defendant's allegations are utterly without merit.

First of all, with respect to the Defendant's competency, defense counsel waived any futile attempt to adhere to the letter of Rule 3.210 with respect to the number of experts because as counsel stated, such an effort in the present circumstance would not, "serve any additional purpose." May 17, 1982, at p.13. It, was also defense counsel's view that the Court and attorneys had in fact complied with the rule. See, Id., at pp.11-12. Indeed Rule 3.120 provides only that the trial court, "shall order the defendant to be examined by...[no] fewer than two experts." It is undisputed that the trial court did make such an order and in fact increased the number to three experts. There is therefore no factual or legal basis for the Defendant's complaint and in any event his present complaint as to the "numbers" of experts under Florida's rule was waived by counsel's insistence that the Rule was complied with and urging the trial court to accept Dr. Amin's report. Cf., Lucas v. State, 376 So.2d 1149 (Fla. 1979)(defendant acquised in waiver of state's failure to comply with state procedural rule).

Furthermore, there was substantial evidence herein consisting of, the examination of the Defendant by Dr. Amin; the trial court's observations of the Defendant; defense counsel's acceptance of Dr. Amin's report without any complaints as to his own observations of the defendant; the

Defendant's prolific, articulate pre-trial pleadings, and the trial court's lengthy voir dire of the Defendant, by which the trial court could have reasonably concluded that there was no "bona fide doubt" as to the Defendant's competency. See, Ferguson v. State, 417 So.2d 631, at 634 (Fla. 1982); Williams v. State, 396 So.2d 167, at 269 (Fla. 3d DCA 1981); see, also, Pate v. Robinson, 383 U.S. 375, at 385, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); Reese v. Wainwright, 600 F.2d 1085, at 1091 (5th Cir. 1979); see, also, United States v. Kossa, 562 F.2d 959 (5th Cir. 1977), cert. denied, 434 U.S. 1075, 98 S.Ct. 1265, 55 L.Ed.2d 781 (1978); Nettles v. State, 409 So.2d 85, 88 (Fla. 1st DCA 1982). Under these circumstances, the failure to have more than one expert and the Defendant's other complaints as to the finding of competency are properly rejected[1]. See, Tait v. State, 387 So.2d 338 (Fla. 1980)(failure to have hearing); Ross v. State, 386 So.2d 1191, at 1195-96 (Fla. 1980)(only one expert).

Finally, as noted above in the Statement of the Case, there was an extensive thirty (30) page inquiry by the trial court on both the "issue" of the Defendant's competency and the Defendant's desire to represent himself. See, June 7, 1982 at pp.5-36. In Faretta v. California, 422 U.S. 806,

[1]. This Court should also consider that the Defendant's competency was repeatedly comfirmed by four psychiatrists and the trial court and repeatedly reviewed by this Court in Knight v. State, 338 So.2d 201 (Fla. 1976); Knight v. State, 394 So.2d 997 (Fla. 1981) and Muhammad v. State, 426 So.2d 533 (Fla. 1982).

at 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the court explained the basis of the evaluation of the defendant's assertion of the right to represent himself:

> "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish 'that he knows what he is doing and his choice is made with eyes open.'"

What is wholly apparent on this record is, 1.) that the Defendant was articulate, alert and completely informed of his rights; 2.) That the trial court clearly warned the Defendant of the consequences of representing himself and 3.) that the Defendant is a mature adult with extensive previous experience with the criminal justice system. In fact the face of the record and trial transcript clearly reflect a defendant with high intelligence, who demonstrated a substantial grasp of Motion practice; rules of procedure and courtroom decorum and skillfully cross-examined all witnesses, especially the State's main eyewitness, Brown. The State submits that these factors together with the Defendant's repeated demands to represent himself, properly establish the waiver required by Faretta. See, United States v. King, 582 F.2d 888 (4th Cir. 1978)(defendant makes clear choice after dialogue with trial court); United States

v. Pavich, 568 F.2d 33 (7th Cir. 1978)(defendant repeatedly demands to represents himself); United States v. Jordan, 508 F.2d 750 (7th Cir. 1975)(defendant declines multiple offers of counsel by trial court); United States v. Jones, 438 F.2d 1199 (6th Cir. 1971), cert. den., 404 U.S. 913 (1974)(defendant discharges attorney and refuses others); Frye v. United States, 411 F.2d 562 (5th Cir. 1969)(defendant declines counsel; refuses repeated offers for counsel); Rotolo v. United States, 404 F.2d 316 (5th Cir. 1968)(defendant files writ demand to proceed pro se and in sists that counsel not be appointed). That the trial court acceded to the Defendant's adamant demands to represent himself should not be disturbed on this record.

SECOND ISSUE

THE DEFENDANT HAS FAILED TO SHOW ANY ERROR IN THE TRIAL COURT'S REFUSAL TO PERMIT THE DEFENDANT TO PRESENT AN INSANITY DEFENSE.

This "issue' was not presented at any time to the trial judge who tried the case. In fact, the Defendant himself filed a sworn document entitled, "Motion to Withdraw Notice of Intent to Claim Defense of Insanity," in which he stated he did not wish to assert insanity as a defense and did not want to call any witness as to that issue[2]. See, R420. Under such circumstances any complaint for the first time on appeal as to this "issue" is waived. See, e.g., Clark v. State, 363 So.2d 331 (Fla. 1978). In any event, this Court has also held that a defendant, who refuses to be examined by expert witnesses as in the case at bar, waives any right he may have had to represent any insanity defense[3]. See Christopher v. State, 416 So.2d 450 (Fla. 1982); Bannister v. State, 358 So.2d 1182 (Fla. 2d DCA 1978); McMunn v.

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[2]. The Defendant called every witness he listed except two, "O. A. Phipps" and "Roger D. Browne." See, R439; Transcript "Index" at iv. There is no required offer anywhere in the record as to what these witnesses would have said.

[3]. As opposed to "competency" which is not waivable by simply failing to raise it if there is evidence that creates a "reasonable doubt" as to the Defendant's competency. See, State v. Tait, supra.

State, 264 So.2d 868 (Fla. 1st DCA 1972). The Defendant's complaint is therefore properly rejected.

THIRD ISSUE

THE DEATH PENALTY IS APPROPRIATE HEREIN.

The Defendant contends that the trial court improperly found that the Defendant was under a sentence of imprisonment under Section 921.141(5)(a) and that the Defendant had been convicted of a violent felony or capital felony under Section 921.141(5)(b). The Defendant reasons that this is "doubling" or a mandatory death penalty. The Defendant also argues that the trial court failed to consider his mental status in assessing mitigation.

The Defendant's first contention has been uniformly rejected by this Court. See, Agan v. State, 445 So.2d 326 (Fla. 1984); Lusk v. State, 446 So.2d 1038 (Fla. 1984); Williams v. State, 438 So.2d 781 (Fla. 1983); Morgan v. State, 415 So.2d 6 (Fla. 1982); Demps v. State, 395 So.2d 501 (Fla. 1981). There is also no automatic "doubling" here since the Defendant could also be imprisoned for a non-capitol or non-violent felony. Compare, Francois v. State, 407 So.2d 885 at 891 (Fla. 1982).

With respect to the Defendant's latter claim, it is apparent on the record that the trial court did consider and rejected the Defendant's mental state during the offense as mitigation. See, R460-R461. There is no error under such a

circumstance. See, Knight v. State, 394 So.2d at 1003 (trial judge simply considered and rejected the defendant's claim of mitigation); Thompson v. State, 389 So.2d 197 (Fla. 1980)(same).

Finally, the testimony of the sole eyewitness, Brown, was sufficient to sustain the Defendant's conviction for first degree murder. See, State v. Nova, 361 So.2d 411 (Fla. 1978); State v. Sebastian, 171 So.2d 893 (Fla. 1965); Thomas v. State, 167 So.2d 309 (Fla. 1964); see, e.g., Ferguson v. State, 417 So.2d 639 (Fla. 1982); Tibbs v. State, 397 So.2d 1120 (Fla. 1981). Additionally, there is no doubt that the aggravating circumstance under Section 921.141(5)(h) that the crime was especially heinous, atrocious or cruel, was clearly proven in the present case. See, e.g., Arango v. State, 411 So.2d 172 (Fla. 1982); Booker v. State, 397 So.2d 910 (Fla. 1981); Straight v. State, 397 So.2d 903 (Fla. 1981). Given three aggravating circumstances and no statutory mitigitation circumstances, the death penalty is appropriate and lawful herein. See, e.g., Straight v. State; Booker v. State, supra; Ruffin v. State, 397 So.2d 277 (Fla. 1981); Washington v. State, 362 So.2d 658 (Fla. 1978).

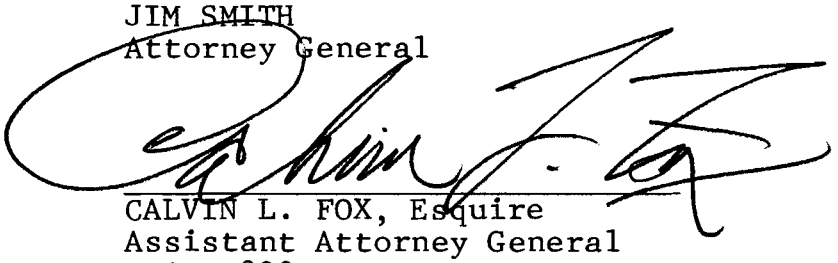
IV

CONCLUSION

WHEREFORE, upon the foregoing, the Appellee, THE STATE OF FLORIDA, prays that this Honorable Court will issue its order affirming the judgment below.

RESPECTFULLY SUBMITTED, on this 10th day of December, 1984, at Miami, Dade County, Florida.

JIM SMITH
Attorney General



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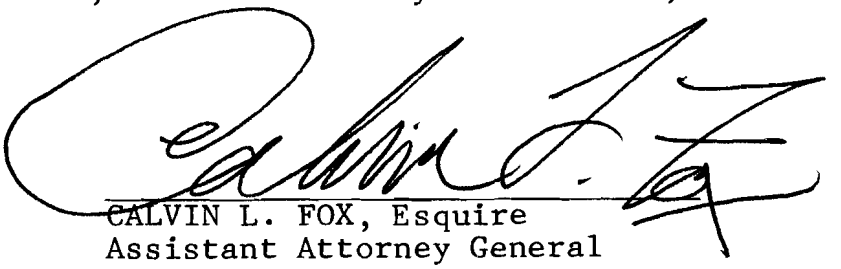
V

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was caused to be mailed to MICHAEL E. ALLEN, Assistant Public Defender, P.O. Box 671, Tallahassee, Florida 32302, on this 10th day of December, 1984.



CALVIN L. FOX, Esquire
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