IN THE SUPREME COURT OF THE STATE OF FLORIDA

ISAAC FLOYZELL THOMPSON,

Appelland,

vs. Appellate Case No. 63,398

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
FOR HILLSBOROUGH COUNTY, FLORIDA

BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

RJK:clc

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

I.

WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT APPELLANT'S PRIOR CONVICTION OF THE CRIME OF RESISTING ARREST WITH VIOLENCE CONSTITUTED AN AGGRAVATING CIRCUMSTANCE UNDER CHAPTER 921.141(5)(b) FLORIDA STATUTES.

Appellant first contends that his prior conviction for resisting arrest with violence did not constitute an aggravating circumstance pursuant to Florida Statute 921.141(5)(b). For the reasons expressed below, appellant's point must fail.

Initially, it must be observed that appellant made no challenge in the trial court to the State's use of the prior conviction for resisting arrest with violence. In fact, defense counsel, in his argument to the jury during the sentencing phase, expressly acknowledged that the State had introduced evidence of a previous crime which is recognized under Florida Statute 921.141(5)(b) (R 742). Not only did appellant not present this issue to the trial court, but he also acquiesced that the State had introduced evidence of a prior crime which would support the aggravating circumstance of Section 921.141(5)(b). Appellate relief is precluded on this point. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

Notwithstanding appellant's failure to present the instant issue to the trial court for its consideration, he argues now on appeal that resisting arrest with violence is

not a crime which would qualify as a previous conviction "of a felony involving the use or threat of violence to the person." Florida Statute 921.141(5)(b). In Mann v. State, 420 So.2d 578 (Fla. 1982), this Honorable Court specifically held that:

> ...a prior conviction of a felony involving violence must be limited to one in which the judgment of conviction discloses that it involved violence. (Text at 581)

Undoubtedly, a prior conviction for resisting arrest with violence is one in which the judgment of conviction discloses, on its face, that it involves violence. Appellant's reliance on State v. Green, 400 So.2d 1322 (Fla. 5th DCA 1981), is misplaced. Appellant, in his brief at pages 10 and 11, states that the Fifth District in Green held that arrest by wiggling and struggling could constitute the commission of the crime of resisting arrest with violence. However, it was merely held in Green that an information which alleged that the defendant "wiggled and struggled" could not be dismissed by motion made pursuant to Florida Rule of Criminal Procedure 3.190(c)(4). The case was remanded so that a jury could decide whether wiggling and struggling constituted "violence" sufficient to satisfy the requirements of Florida Statute 843.01. The basis of the decision in Green was that the fact of wiggling and struggling is ambiguous with regard to whether "violence" has been done to a police officer. Sub judice, we have no ambiguity. The previous judgment

evidences the fact that appellant had, indeed, committed a crime of violence, to wit: Resisting arrest with violence.

Appellant further argues that, pursuant to this Honorable Court's decision in Lewis v. State, 398 So.2d 432 (Fla. 1981), a prior conviction for resisting arrest with violence is not a "life-threatening" crime which would support the finding of the aggravating circumstance enumerated in Florida Statute 921.141(5)(b). However, appellee would assert that it is the "confrontational aspects" of the previous crime which is the most important factor in determining whether a previous conviction satisfies the dictates of Florida Statute 921.141(5)(b). In other words, where the defendant had previously come in direct contact with a human victim and committed a crime of violence, such should be sufficient to support the finding of the aggravated circumstance enumerated in Florida Statute 921.141 (5)(b). Thus, this Honorable Court has determined that prior convictions for breaking and entering with intent to commit a felony, for escape, for grand larceny, for possession of a firearm by a convicted felon, and for burglary do not constitute prior crimes which can be used to sustain the aggravating circumstance. Lewis, supra, and Mann, supra. In the instant case, however, appellant has been previously convicted of a felony, the elements of which necessarily included a confrontation with another human being. Such a confrontation entailing the use or threat of violence is sufficient to satisfy the

dictates of Florida Statute 921.141(5)(b).

The instant case is unlike Williams v. State, 386 So.2d 538 (Fla. 1980), wherein the State failed to offer any evidence of a prior conviction. Here, the State introduced a previous judgment and sentence for resisting arrest with violence and, therefore, sustained its burden of proof as to this aggravating circumstance. The facts and the decision in Simmons v. State, 419 So.2d 316 (Fla. 1982), is helpful in the analysis of the instant cause. In Simmons, the State presented a certified copy of the defendant's previous judgment of conviction for robbery. Similarly, the State in the instant cause introduced appellant's prior judgment and conviction for resisting arrest with violence. In Simmons, however, the defense subsequently presented the deposition of the victim from the previous robbery case. This court held in Simmons that robbery is as a matter of law a felony involving the use or threat of violence. In the instant case, however, the defendant failed to show the circumstances of his previous conviction for resisting arrest with violence in an effort to prevent the fact of such conviction from being used to enhance his sentence. The jury and the trial court weighed the aggravating circumstances and the mitigating circumstances with the knowledge that defense counsel conceded that the prior conviction for resisting arrest with violence was one that is the type of crime which satisfies the conditions of Florida Statute 921.141(5)(b). Inasmuch as a judgement and

conviction for resisting arrest with violence discloses on its face that it involves violence, and inasmuch as appellant failed to present the argument he now makes in his Point I to the trial court, appellant's Point I must fail.

II.

WHETHER THE TRIAL COURT ERRED IN FINDING THE EXISTENCE OF THE AGGRAVATING CIRCUMSTANCE OF CHAPTER 921.141(5)(i) FLORIDA STATUTES.

Appellant next contends that the trial court erred by finding that the murder committed by appellant was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In so finding, the trial court determined:

> I. THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.
>
> FACT:
>
> The eye-witness testimony of Angela Hicks revealed that during the attempted robbery of Robert Kelly, the Defendant was approximately six feet away from Kelly. At that time he was armed with a .12 guage shotgun. Robert Kelly told the Defendant he had no money and laughed. At that time the Defendant shot Robert Kelly in the upper left chest area and fled the scene.
>
> CONCLUSION:
>
> The conduct of the Defendant reflects beyond and to the exclusion of a reasonable doubt that he, being deprived of any of the victim's money had sufficient time to reflect upon his next course of action and instead of simply fleeing, he consciously chose to terminate the life of Robert Kelly. These facts warrant the

> conclusion that the capital felony was a homicide and was committed in a cold, calculated manner without any pretense of moral or legal justification.

The trial court did not err in reaching the conclusion that appellant committed a capital felony in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

In McCray v. State, 416 So.2d 804 (Fla. 1982), this Honorable Court held that the aggravating circumstance embodied in Florida Statue 921.141(5)(i) applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive. McCray, Id. at 807. Appellee maintains that the facts of the instant case amply demonstrate that the murder, indeed, was committed in a cold and calculated manner without any pretense of moral or legal justification. Therefore, although not strictly characterized as an execution or contract murder, the instant capital felony is in the nature of those premeditated murders which are considered cold and calculated.

The facts adduced during the guilt phase of appellant's trial evidence the cold, calculated manner in which the murder was committed. Angela Hicks, the only eyewitness to the actual murder, testified that appellant confronted Mr. Robert Kelly, the attendant at the United 500 gasoline station on 40th Street in Tampa, and demanded money. At the time, appellant was armed with a shotgun (R 502-503). Mr. Kelly

was sitting on a chair reading a newspaper when appellant approached. Upon being confronted, Mr. Kelly advised appelant that he had no money, and then proceeded to pick up the chair he had been seated in and held it up at shoulder level with both of his hands in order to block himself from appellant, i.e., he assumed a defensive posture (R 503-504). When appellant asked for his money, Mr. Kelly laughed while holding the chair and appellant proceeded to shoot him. After the shooting, appellant immediately ran to the waiting get-away vehicle (R 504). No money was taken from the gas station during the incident (R 463). Approximately 12 noon the following day, appellant encountered Roger Toliver and told Mr. Toliver, "you know and I know all real niggers know what happened to that man last night. Yes, I killed him because he picked up the chair." (R 459).

In Combs v. State, 403 So.2d 418 (Fla. 1981), this Honorable Court determined that in order to consider the elements of a premeditated murder as an aggravating circumstance, the premeditation must have been "cold, calculated and ... without any pretense of moral or legal justification." Combs, Id. at 421. Appellant concedes that premeditation was evidenced but he argues that such premeditation does not constitute coldness and calculation and a lack of any pretense of moral or legal justification (appellant's brief at pages 14-15). Appellee, however, maintains that based on the

foregoing factual circumstances of the instant cause, the cold and calculated nature of the premeditated murder which is the subject of this appeal has been demonstrated. What we do not have is a murder resulting from the depraved mind of an individual. Rather, we are confronted with a murder which was committed coolly, and with absolutely no justification. Appellant consciously planned to rob the United 500 station and, in the process thereof, armed himself with a shotgun. Upon confronting the attendant, and upon being advised that there was no money to "give over," appellant apparently did not become enraged. Rather, as he related to Mr. Toliver the following day, he cold-bloodedly shot Mr. Kelly merely because Mr. Kelly had picked up a chair in an effort to block any advances by appellant. After the shooting, appellant apparently did not deem it necessary to extract money from the prone victim, even though he was aware from his prior conversations with Ms. Hicks and Ms. Johnson that money was in the attendant's pocket. Thus, his murder of Robert Kelly furthered no interest of appellant. As the trial court correctly determined, upon being deprived of any money, appellant could have fled or acted in a manner other than the way in which he did. He coldly chose to terminate the life of Robert Kelly and undoubtedly committed a capital felony in a cold, calculated manner without any pretense of moral or legal justification. The trial court's finding was correct.

III

WHETHER THE TRIAL COURT FAILED TO GIVE DUE CONSIDERATION TO THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND WHETHER THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH NOTWITHSTANDING THAT JURY RECOMMENDATION.

For the sake of clarity, appellee will address the points raised by appellant in his issues Three and Four in this one point. Appellant first contends that the trial court failed to give due consideration to the jury's recommendation of a life sentence. Second, appellant argues that the trial court erred in overriding the jury's recommendation of a life sentence when he imposed the death penalty. For the reasons expressed below, appellant's contentions are without merit.

Appellant first urges this court to make a finding that the trial court failed to give due consideration to the jury's recommendation of life imprisonment. However, it is apparent from the record that the trial court did, indeed, consider the jury's recommendation and, in fact, anticipated a recommendation of mercy prior to the imposition of the death penalty. After finding three aggravating and no mitigating circumstances, the trial court opined:

> ...this court must, in order to justify death, be convinced that the facts are so clear and convincing that no reasonable person can differ. (R 759).

Thus, it is apparent that the trial court was cognizant of the standard necessary to impose a death sentence over a

jury's recommendation of life imprisonment. Presumably, while the jury was deliberating as to the sentence to be recommended, the trial court was weighing the aggravating and mitigating circumstances. As this Honorable Court held in King v. State, 390 So.2d 315 (Fla. 1980), there is no legal principle which bars the trial judge from considering the aggravating and mitigating circumstances while the jury similarly deliberates. King, Id. at 321. The trial court in the instant case, as did the trial court in King made specific written findings reflecting specific application of the facts to the statutory aggravating and mitigating circumstances. Likewise, inasmuch as the trial court knew that death could be imposed only where the facts are so clear and convincing that no reasonable person can differ, it is apparent that the trial court had already anticipated that the jury might return a recommendation of life imprisonment. The trial court gave due consideration to that recommendation and adequately weighed the aggravating and the mitigating circumstances prior to the imposition of the death penalty. Inasmuch as the court found three aggravating circumstances and no mitigating circumstances, it was appropriate for the court to impose a sentence commensurate with such a finding, i.e., the death sentence.

Appellant further urges this Honorable Court to find that the trial court improperly overrode the jury's recommendation or mercy. As aforementioned, the trial court did find three aggravating and no mitigating circumstances. Death is

presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances. State v. Dixon, 283 So.2d 1 (Fla. 1973). Thus, a question arises in this cause as to whether the presumption of death being presumed to be the proper penalty is "rebutted" by a jury's recommendation of life imprisonment. In the case at bar, appellee urges that death is the proper penalty.

In Tedder v. State, 322 So.2d 908 (Fla. 1975), this Honorable Court held that in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. Tedder, Id., at 910. Appellee would first submit with respect to Tedder that continued adherence to that opinion results in the jury becoming the sentencer in capital cases. Florida Statute 921.141(3) provides:

> (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 circumstance, shall enter a sentence of life imprisonment or death,... (emphasis supplied)

Thus, the statute specifically provides that the judge must weigh the aggravating and mitigating circumstances and may impose a sentence of death notwithstanding the jury's recommendation. Such an interpretation is reasonable when

it is considered that the jury's recommendation is simply a sample of the conscience of the community with respect to the particular case before it. Under Tedder, where the jury recommends life the focus is then on that recommendation, rather than to the trial court's weighing of the aggravating and mitigating circumstances. Thus, it does not matter to what degree the trial judge finds the aggravating circumstances outweigh the mitigating. The death penalty cannot be imposed according to Tedder unless it is shown that the jury acted irrationally. Such a standard leads to overemphasizing the jury recommendation rather than placing the trial court in the true posture of having imposed sentence. Although the advisory recommendation of the jury is to be accorded great weight, the ultimate decision on whether the death penalty should be imposed rests with the trial judge. Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 99 S.Ct. 293, 58 L.Ed.2d 265 (1978). It must be questioned as to whether the Tedder standard actually allows the trial court to actually impose sentence.

Notwithstanding the above argument as to the problems inherent in the Tedder decision, appellee would assert that, in the case at bar, the Tedder standards have been met, thus justifying the imposition of the death penalty by the trial court. In the case at bar the trial court properly found three aggravating and no mitigating circumstances. Any mitigating circumstances which could have been considered by the jury

would not have outweighed those three aggravating circumstances, and, hence, the imposition of the death penalty by the trial court was proper and was consistent with Tedder. Cf. White v. State, 403 So.2d 331 (Fla. 1981); Hoy, supra; McCrae v. State, 395 So.2d 1145 (Fla. 1981). Where, as here, the trial court has clearly found several aggravating factors and no mitigating factors, the override of a jury recommendation of life is proper, especially sub judice where the jury was apparently deadlocked at six to six. The trial court did not err.

CONCLUSION

Based upon the foregoing reasons, argument and authorities, the judgment and sentence of death imposed by the trial court should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Robert J. Krauss

ROBERT J. KRAUSS
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail to Simson Unterberger, Esquire, 725 East Kennedy Boulevard, Suite 300, Tampa, Florida 33602 on this the 1st day of August, 1983.

Robert J. Krauss
Of Counsel for Appellee