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IN THE SUPREME COURT OF THE STATE OF FLORIDA

ISAAC FLOYZELL THOMPSON :

Appellant :

vs. :

Appellate Case No. 63,398

STATE OF FLORIDA :

Appellee :

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

The following designations are used in this Brief.

a. "Appellant" refers to Isaac Floyzell Thompson.

b. "R" refers to pages of the record on appeal.

I S S U E S

ISSUE NUMBER 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

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WHETHER THE TRIAL COURT FAILED TO GIVE DUE CONSIDERATION TO THE JURY'S RECOMMENDATION PRIOR TO SENTENCING APPELLANT TO DEATH

STATEMENT OF THE CASE AND THE FACTS

On October 20, 1982, a two count Indictment was filed. (R. 826). The first count of the Indictment charged Appellant, Angela Hicks and Irene Johnson with first degree murder. (R. 826). The second count of the Indictment charged Appellant, Angela Hicks and Irene Johnson with attempted robbery. (R. 826).

A Public Defender motion to withdraw and appoint private counsel to represent Appellant was granted by an Order dated November 1, 1982, and pursuant to said order, Alex Vecchio, Esquire, was appointed as Appellant's attorney. (R. 843).

Thereafter, Appellant filed pretrial motions involving the following, to-wit:

a. Motion for Disclosure of Evidence and Testimony Before Grand Jury which was denied. (R. 857-858).

b. Motion to Preclude Challenge for Cause which was denied. (R. 859-863).

c. Motion to Dismiss Indictment or to Declare that Death is not a Possible Penalty which was taken under advisement. (R. 867-868).

d. Motion for Individual Voir Dire and Sequestration of Jurors During Voir Dire which was denied. (R. 869-870).

e. Motion for Co-counsel at Penalty Phase which was denied. (R. 883-884).

f. Motion to Declare Death not a Possible Penalty, which was denied. (R. 885-888).

On January 3, 1983, Angela Hicks and Irene Johnson were permitted to plead guilty to accessory after the fact as a lesser included crime of the first degree murder charged in the first count of the Indictment and to attempted robbery. (R. 819).

From February 8, 1983, through February 11, 1983, a jury trial on the question of Appellant's guilt or innocence of the crimes charged in the Indictment was conducted which culminated in verdicts of guilty of the crimes charged in both counts of the Indictment. (R. 824).

On February 11, 1983, after the rendition of the aforesaid verdicts, a hearing was conducted before Appellant's jury on the question of what sentence should be

recommended by the jury upon Appellant's conviction of the crime charged in the first count of the Indictment, to-wit: first degree murder. Said hearing culminated in jury recommendation of a life sentence. (R. 915). Immediately upon rendition of this recommendation, the trial court adjudicated Appellant guilty of first degree murder and sentenced Appellant to death. (R. 759-760).

On February 14, 1983, Appellant was sentenced, upon his conviction of attempted robbery, as charged in the second count of the Indictment to ninety-nine years to run consecutively to his sentence upon the aforesaid first degree murder conviction. (R. 811).

The facts disclosed during that portion of Appellant's jury trial which resulted in verdicts of guilty are as follows:

According to the testimony of State's witness, Robert Allen, he was staying near the United 500 gasoline station at 3751 North 40th Street, Tampa, Florida, on September 10, 1982, when he heard a "pow" and a man say, "Oh." (R. 198). Upon investigation, he discovered the body of the victim,

Robert Kelly, an employee of the gasoline station lying on the ground by a car. (R. 198, 199, 461).

According to the testimony of the Hillsborough County Medical Examiner, he arrived at the scene and discovered the victim who was dead. (R. 373). Subsequent examination of the cadaver by the Medical Examiner disclosed that the cause of death was a gunshot wound to the victim's chest. (R. 376).

According to the testimony of State's witness, Angela Hicks, she, Appellant, Irene Johnson, and another male, on September 10, 1982, went in Appellant's automobile to certain shipping docks for the purpose of prostitution. (R. 485, 486). Thereafter, Appellant and the other male discussed robbing the aforesaid United 500 gasoline station, but the other man did not want to participate. (R. 40). Sometime thereafter, Appellant instructed Angela Hicks to drive his automobile to the gasoline station, get four dollars worth of gasoline and note where the attendant kept his money. (R. 495). For this purpose, Appellant gave Angela Hicks a twenty dollar bill. (R. 495). Angela Hicks abided by these

instructions and reported to Appellant that the attendant kept money in his shirt pocket. (R. 499). Following this report, Appellant directed Irene Johnson to be prepared to drive his automobile when he and Angela Hicks returned from the gasoline station, and then he and Angela Hicks approached the station. (R. 501). With Angela Hicks to his rear, Appellant, with shotgun in hand, approached the victim and demanded his money. (R. 502). The victim laughed, picked up a chair at which time Appellant fired the shotgun. (R. 503).

In addition to the foregoing, Angela Hicks testified that she was to receive a probationary sentence upon her aforesaid guilty pleas to accessory after the fact and attempted robbery. (R. 509, 510).

The testimony of State's witness, Irene Johnson, was similar to that of Angela Hicks though she did not observe the shooting. Additionally, Irene Johnson, admitted that she knew that a robbery was to occur (R. 335), and that she drove the car with Appellant and Angela Hicks as occupants after the incident in order to achieve a getaway. (R. 339).

In addition to the foregoing, Irene Johnson testified that she was to receive a probationary sentence upon her aforesaid guilty pleas to accessory after the fact and attempted robbery. (R. 348).

The testimony of State's witnesses, Derrick Presley, Edward Woodard and Roger Tolliver was essentially the same, that is, that they and Appellant planned to rob the gasoline station but that they backed out before the incident commenced.

In addition to the foregoing, Derrick Presley testified that, on a pending unrelated robbery charge, he would receive no more than a five year sentence in exchange for his testimony against Appellant. (R. 395, 396).

In addition to the foregoing, Roger Tolliver testified that, on a pending unrelated robbery charge, he had entered a guilty plea in exchange for a sentence not to exceed five years provided he testified against Appellant.

The facts, disclosed in that portion of Appellant's jury trial which resulted in a jury recommendation that Appellant be sentenced to life imprisonment, are as follows.

According to the testimony of State's witness, Robert McDowell, when taken in connection with State's Exhibit 29 (R. 1046), Appellant was previously convicted of resisting arrest with violence.

According to Appellant's witness, Dr. Sidney J. Merin:

a. Appellant is retarded. (R. 711).

b. Appellant's personality is impaired consistent with his retardation. (R. 711).

c. Appellant's estimated I. Q. is seventy. (R. 712).

d. Appellant is unable to think intellectually or abstractly. (R. 713).

e. Appellant understands at a relatively primitive level. (R. 713).

f. Appellant is capable of only very simple types of work which would not require any great degree of thinking or self initiative. (R. 714).

g. Appellant's thinking is simply basic and impulsive. (R. 715).

h. Appellant's ability to conceptualize or use reflection is not a prominent part of his thinking. (R. 716).

i. Appellant has little capacity for empathy. (R. 717).

j. Appellant is primarily motivated by egocentric needs which are generally found in retarded individuals. (R. 717).

k. Appellant is unable to stop and think through what it is he is doing for himself or to other people. (R. 718)

According to the testimony of Appellant's mother, Appellant assisted her in raising her other children. (R. 726). When Appellant worked at a grocery store, instead of being paid in money, he would change his money for food which he would bring home for the family. (R. 726).

According to the testimony of Appellant's wife, Appellant cared for her and her two children. (R. 729). Appellant was a good father to her and her children and Appellant was a good husband. (R. 729).

<u>ARGUMENT UPON ISSUE NUMBER I</u>

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

A prior conviction of a felony "involving the use or threat of violence to the person" is an aggravating circumstance to be considered and weighed in determining whether a defendant convicted of first degree murder should be sentenced to die. Chapter 921.141(5)(b) Florida Statutes.

During the penalty phase of Appellant's trial, the State:

a. Proved that Appellant had previously been convicted of resisting arrest with violence (R. 146).

b. Failed to present any evidence of the facts and circumstances which resulted in Appellant being charged with resisting arrest with violence.

In sentencing Appellant to death, the trial court relied upon several aggravating circumstances including the one set forth in Chapter 921.141(5)(b) Florida Statutes. Specifically, the trial court concluded that Appellant's prior conviction of resisting arrest with violence constituted a previous conviction "of a felony involving the use or threat of violence to the person" (R. 916, 917). Chapter 921.141(5)(b) Florida Statutes. For the following reasons, Appellant contends that a prior conviction for resisting arrest with violence does not constitute an aggravating circumstance under Chapter 921.141(e)(b) Florida Statutes.

First, the aggravating circumstance of Chapter 921.141(5)(b) Florida Statutes refers to "life - threatening crimes." Lewis v. State, 398 So.2d 432 (Fla. 1981). Resisting arrest with violence is not necessarily a life threatening crime. In State v. Green, 400 So.2d 1322 (Fla. 5th DCA 1981), the Court concluded that resisting arrest by wiggling and struggling could constitute the commission of the crime of resisting arrest with violence. Since not all

acts of wiggling and struggling are automatically life threatening, it is clear that not all persons who resist arrest with violence necessarily, by their conduct, threaten the lives of their arrestors. If this be correct, then a mere conviction of resisting arrest with violence does not mean that the act of resisting arrest involves "the use or threat of violence to the person," and if this be so, mere proof of a previous conviction for resisting arrest with violence, without more, does not establish that the crime of resisting arrest with violence constitutes the aggravating circumstance embodied in Chapter 921.141(5)(b) Florida Statutes.

The second reason for Appellant's contention that his prior conviction of resisting arrest with violence does not constitute an aggravating circumstance under Chapter 921.141(5)(b) Florida Statutes is that "offering...violence" as that phrase is used in Chapter 843.01 Florida Statutes is not the same as a "threat of violence" as that phrase is used in Chapter 921.141(5)(b) Florida Statutes. The use of the word "offering" in Chapter 843.01 Florida Statutes refers to

a "proposal" to do something, Scullock v. State, 377 So.2d 682 (Fla. 1979), whereas the word "threat" as used in the criminal law of Florida conjures up something more than a mere intention or opportunity to do something and requires an overt act directed at the victim. Battles v. State, 288 So.2d 574 (Fla. 2d DCA 1974). Based upon the preceding, Appellant suggests that offering violence for the purposes of Chapter 843.01 Florida Statutes differs qualitatively from "threat of violence" as that phrase is used in Chapter 921.141(5)(b) Florida Statute. Appellant further suggests that the act of offering violence referred to in Chapter 843.01 Florida Statutes is one of a lesser magnitude than the threat of violence referred to in Chapter 921.141(5)(b) Florida Statutes especially in view of the emphasis on "life - threatening" elucidated in Lewis v. State, supra.

For all of the foregoing reasons, the trial court's reliance upon Appellant's mere previous conviction for resisting arrest with violence substantiates the existence of the aggravating circumstance contained in Chapter 921.141(5)(b) Florida Statutes is misplaced.

ARGUMENT UPON ISSUE NUMBER II

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

In its specific written findings supporting its imposition upon Appellant of the death sentence, the trial court found as an aggravating circumstance the one contained in Chapter 921.141 (5)(i) Florida, to-wit: that Appellant's crime was committed in a cold, calculated and premeditated murder without any pretense of moral or legal justification. (R. 919, 926).

The only eyewitness to the first degree murder of which Appellant was convicted was Angela Hicks who testified that:

a. Appellant, with shotgun in hand, confronted the victim, a service station attendant, and instructed the victim to give over his money. (R. 502).

b. In response, the victim advised Appellant that he had no money, laughed and picked up a chair. (R. 502,

503).

c. Upon the occurrence referred to in (b) above, Appellant fired the shotgun, killing the victim. (R. 504).

As related by the trial court (R. 919), after being advised as aforesaid by the victim, Appellant, instead of fleeing forthwith, reflected on his next act and consciously chose to fire his shotgun and kill the victim before fleeing. These actions, according to the trial court, prove beyond a reasonable doubt that Appellant's act of shooting was "cold, calculated and premeditated without..."(R. 919, 926).

Appellant's position is that the trial court's rationale constitutes an excellent argument as to why his crime was premeditated but fails, in all respects, to reflect why it rises above mere premeditation into the lofty and limited heights of cold and calculated and without any pretense of moral or legal justification. Appellant concedes that a "sufficient time to reflect" can result in a finding of premeditation. Appellant concedes that a "conscious choice" to kill can constitute premeditation. But, since premeditation alone does not also automatically constitute

coldness and calculation and a lack of any pretense of moral or legal justification, Combs v. State, 403 So.2d 418 (Fla. 1981), Appellant contends that the trial court's conclusion as to the aggravating circumstance of Chapter 921.141(5)(i) Florida Statutes is grossly deficient.

The aggravating circumstance of Chapter 921.141(5)(i) Florida Statutes ordinarily applies to those murders "which are characterized as execution or contract murders." McCray v. State, 416 So.2d 804 (Fla. 1982). In McCray v. State, the victim was sitting in a van which was approached by McCray. As he approached, McCray yelled, "This is for you, mother fucker," and shot the victim three times in the stomach. On appeal, this murder, apparently because it was not an execution or a contract murder, was deemed not to have been committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In Combs v. State, supra, Combs lured Perry and Parks into a wooded area and then held them at gun point. Combs demanded money and cocaine from Parks and Perry. No money was forthcoming, but Parks threw a quantity of cocaine several

feet from Combs and told Combs to go find it. This angered Combs who advised that he was going to shoot Perry just so Parks (Perry's girl friend) could see Perry die. Thereafter, Parks began to cry, and she and Perry exchanged declarations of love. Then Combs shot Parks in the head three times, any one of which would have caused death. Combs killing of Parks was deemed to have been committed in a "cold, calculated...."

Clearly, Appellant's act towards the victim more resembles the actions of McCray than it does the act of Combs. Appellant contends that his act, in reality, is even less aggravating and serious than that of McCray. If this be so, then undoubtedly Appellant's act, like that of McCray, was not an execution or contract murder or of the type contemplated by Chapter 921.141(5)(i) Florida Statutes, and it was error for the trial court to have treated it so for the purposes of supporting its imposition of the death penalty upon Appellant.

For all the reasons set forth herein, the trial court erred in finding, in Appellant's case, the aggravating circumstances of Chapter 921.141(5)(i) Florida Statutes.

ARGUMENT UPON ISSUE NUMBER III

WHETHER THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH DESPITE A JURY'S RECOMMENDATION OF A LIFE SENTENCE

Appellant was convicted of the crime of first degree murder. (R. 903). As a result of the conviction, a penalty proceeding pursuant to Chapter 921.141 Florida Statutes was conducted. At the conclusion of the penalty proceeding, the jury recommended that Appellant be sentenced to life imprisonment for the crime. (R. 755). Thereafter, and despite said recommendation, the trial court sentenced Appellant to death. (R. 760, 923, 927, 928).

Jury sentencing recommendations in capital cases are to be given great deference by both trial and appellate courts. Shue v. State, 366 So.2d 387 (Fla. 1978). Such a recommendation should not be overridden unless the facts suggesting a death sentence are so clear and convincing that virtually no reasonable person could differ. Tedder v.

State, 322 So.2d 908 (Fla. 1975).

Appellant's position is that, under the facts of this case, reasonable persons could have easily differed over whether the death penalty should have been imposed.

In its written findings in support of its death sentence, the trial court found the existence of three aggravating circumstances, to-wit: that

a. Appellant had been previously convicted of a felony involving the use or threat of violence to the person. Chapter 921.141(5)(b) Florida Statutes.

b. Appellant's crime occurred during the commission or attempted commission of a robbery. Chapter 921.141(5)(d) Florida Statutes.

c. Appellant committed this crime in a cold, calculated manner without any pretense of moral or legal justification. Chapter 921.141(5)(i) Florida Statutes.

For the purposes of this argument, Appellant will concede the establishment of the aggravating circumstance referred to in (b) above. As to the aggravating circumstances referred to in (a) and (c) above, they are

already challenged in other portions of this brief.

Arrayed against these aggravating circumstance or circumstances, whatever they may be, if any, in addition to the one referred to in (b) above, are none of the mitigating circumstances referred to in Chapter 921.141(b) Florida Statutes. However, the mere nonexistence of these statutorily established mitigating circumstances does not preclude consideration, as mitigating factors, of any aspect of Appellant's character or any evidence which might justify a reduction of a death sentence to life imprisonment. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978); Songer v. State, 365 So.2d 696 (Fla. 1978); Perry v. State, 395 So.2d 170 (Fla. 1981).

In Appellant's case, there are a whole series of items in evidence which reasonable persons might conclude would justify a life, and not a death, sentence.

First is the testimony of Dr. Sidney J. Merin, a psychologist, who testified during the penalty phase of Appellant's trial and rendered the following expert opinions, to-wit:

(a) That Appellant scored in the one percentile in the Peabody Picture Vocabulary test which means that Appellant has difficulty processing verbal data coming into his brain. (R. 710).

(b) That Appellant, on a more comprehensive test, the Wechsler Adult Intelligence Scale, was so incapable of answering virtually every subtest that the test was discontinued. (R.711).

(c) That the results of the aforesaid two tests was a conclusion that Appellant was "rather retarded in his intellectual capabilities." (R. 711).

(d) That Appellant is retarded. (R. 711).

(e) That Appellant's personality was functionally impaired consistent with retardation. (R. 711).

(f) That Appellant's estimated I.Q. was about seventy. (R. 712).

(g) That Appellant cannot think intellectually, cannot think abstractly and finds it difficult to conceptualize. (R. 713).

(h) That Appellant is only capable of very simple types of work which would require very little thinking, would require supervision and would not require initiative. (R. 714).

(i) That Appellant's thinking is basic, very primitive and very impulsive. (R. 715).

(j) That Appellant's intelligence deprives him of a certain degree of reflective capabilities. (R. 717).

(k) That Appellant has little capacity for empathy. (R. 717).

(l) That Appellant is primarily motivated by egocentric needs which is consist in immature people such as small children aand retarded people. (R. 717).

Second is the testimony of Appellant's mother, Mary Louise Thompson, who spoke of how Appellant helped her raise her other children and how he would work so as to bring home food for the family. (R. 725, 726).

Third is the Appellant's wife, Cynthia Jean Thompson, who testified that Appellant supported her and the children and was a good father and husband. (R. 729).

Fourth is the testimony of Angela Hicks who testified that:

(a) Knowing that Appellant desired to rob a service station, she took money to the service station for the purpose of getting gasoline and determining where the attendant, the victim in this case, kept his money. (R. 495, 496).

(b) She accompanied Appellant when he went to rob the victim. (R. 501).

(c) She was charged with first degree murder and attempted robbery along with Appellant but was permitted to plead guilty to accessory after the fact of murder and attempted robbery for a sentence of probation. (R. 509, 510).

Fifth is the testimony of Irene Johnson who testified that:

a. Prior to the attempt to rob the victim, she knew what Appellant was about to do. (R. 335).

b. After the shooting of the victim, she drove the getaway car. (R. 339).

c. She was charged with first degree murder and attempted robbery along with Appellant and Angela Hicks but was permitted, in exchange for her testimony against Appellant, to plead guilty to accessory after the fact of murder and attempted robbery for a sentence of probation. (R. 347, 348, 351).

Sixth is the testimony of Roger Edward Tolliver who advised that he conspired to rob the service station in question with Appellant and others but dropped out before the robbery occurred. (R. 439-454). Mr. Tolliver also related that he had charges pending against him in an unrelated robbery and was permitted to plead guilty to said charges for a sentence not to exceed five years provided he testified against Appellant. (R. 452, 453). Mr. Tolliver acknowledged that, on his robbery charge, he could have been sentenced up to life imprisonment. (R. 457).

Finally is the testimony of Derrick C. Presley, who, like Roger Edward Tolliver, had conspired with Appellant to rob the service station in question but who dropped out before the robbery occurred. (R. 378-394). At the time he

testified against Appellant, Mr. Presley had pending an unrelated armed robbery charge, a charge of auto theft and a probation violation (R. 390). Mr. Presley advised that in exchange for his testimony against Appellant, he would get no more than five years on his armed robbery charge. (R. 390).

With respect to Dr. Merin's testimony, it clearly bore upon aspects of Appellant's character and therefore was available for weighing and consideration by the jury. In Neary v. State, 384 So.2d 881 (Fla. 1980), there was, among other things, evidence that Neary was a slow learner and needed special assistance to keep up in school. In Neary, supra, the Florida Supreme Court recognized that this was a factor which could have influenced a jury to recommend life imprisonment for one convicted of first degree murder. In Ruffin v. State 397 So.2d 277 (Fla. 1981), the Florida Supreme Court noted that Ruffin's dull, normal intelligence could be considered as a circumstance in mitigation of a death sentence. Dr. Merin's detailed testimony concerning Appellant's intelligence, retardation and personality function likewise could have contributed to his jury

recommending life imprisonment instead of death.

With regard to the testimony of Appellant's mother and wife, while not extensive, it nevertheless reflected that Appellant had acted responsibly and correctly towards various members of his family. This clearly constituted evidence as to an aspect of Appellant's character and was thus available to the jury and could have contributed to its recommendation as to Appellant's sentence.

With regard to the testimony of Angela Hicks and Irene Johnson as to the leniency received by them for their testimony against Appellant, such has been frequently recognized as a factor which could influence a jury's recommendation. In Barfield v. State, 402 So.2d 377 (Fla. 1981), a trial court's override of a jury's recommendation of a life sentence was reversed. In ordering a life sentence, the Court noted certain factors which apparently influenced the jury's recommendation of a life sentence which included the fact that a participant in the crime received immunity, a codefendant received a five year sentence and another codefendant had all charges dropped, all in exchange for his

testimony against Barfield. Certainly, the treatment received by Angela Hicks and Irene Johnson could easily have been considered by Appellant's jury in mitigation of a death sentence, especially in view of the fact that Appellant's jury was fully instructed on the subject of aiders and abettors (R. 673), and thus knew that persons who could have been convicted of and probably should have been convicted of the same first degree murder, of which Appellant was convicted, and who would therefore have been confronted with the same sentencing alternative as was Appellant were permitted to plead to lessor offenses in exchange for probation, provided they testified against Appellant.

In view of the Barfield, supra, recognition, Appellant also contends that the proof that Roger Edward Tolliver and Derrick C. Presley had also received leniency in unrelated cases in exchange for testifying against Appellant is also a factor which could have influenced Appellant's jury to recommend a life sentence.

Chapter 921.141(2) Florida Statutes requires both trial court and jury to weigh aggravating and mitigating (statutory

or otherwise) circumstances. Assuming that all three aggravating circumstances cited by the trial court were sufficiently proven, Appellant contends that, in view of all the factors in mitigation just cited by him in this Brief, reasonable persons could have disagreed over whether Appellant's sentence should have been life or death. This is even especially so, since a jury could have easily and reasonably attached little weight to the fact of Appellant's conviction of resisting arrest with violence. Resisting arrest with violence, if it does qualify as a crime, the conviction of which is entitled to treatment as an aggravating circumstance under Chapter 921.141(4)(b) Florida Statutes, is nevertheless not a rape, robbery, aggravated battery, arson or other of the truer crimes of violence which the public and jurors are likely to view as really serious crimes involving the use or threat of violence. Additionally, if it is recognized that there are all types of cold and calculated murders, such as execution style killings and contract murders, it is clear that Appellant's jury may have attached little weight to the cold and calculated

fashion, if any, of Appellant's act in view of the facts surrounding the killing of the victim.

Of course, Appellant's position as to how the jury may have reached a life recommendation, assuming the existence of the aggravating circumstances cited by the trial judge, is enhanced if, for instance, it is concluded, as Appellant has contended in this Brief, that a conviction of resisting arrest with violence is not an aggravating circumstance under Chapter 921.141(5)(b) Florida Statutes. And, such position is doubly enhanced if it is also concluded, as Appellant has also argued in this Brief, that the proof in the case was insufficient to establish that Appellant's offense committed was in a "cold, calculated and premeditated manner without..." Chapter 921.141(5)(1) Florida Statutes.

The upshot of all the preceding is that the facts of Appellant's case do not suggest a death sentence with such clarity and conviction as to preclude a disagreement as to sentence among reasonable people. The trial court erred in overriding the jury's recommendation of a life sentence for Appellant.

ARGUMENT UPON ISSUE NUMBER IV

WHETHER THE TRIAL COURT FAILED TO GIVE DUE CONSIDERATION TO THE JURY'S RECOMMENDATION PRIOR TO SENTENCING APPELLANT TO DEATH

Appellant's jury retired at 5:35 p.m. on Friday, February 11, 1983, to deliberate upon what sentence it should recommend be imposed upon Appellant for his conviction of first degree murder (R. 694, 753). Court reconvened at 6:05 p.m. to deal with the jury's message that it was deadlocked at six to six and to determine what instructions to give in response to the message (R. 753, 754). Thereafter, short instructions were given (R. 754, 755) and the jury again retired at 6:10 p.m. (R. 755). At 6:12 p.m., the jury returned with a recommendation of life imprisonment (R. 755). After brief comments by defense counsel, the trial court launched into a verbal justification of what it was about to do regarding sentencing which concluded with the imposition of the death sentence upon Appellant (R. 757 - 760). Court

adjourned at 6:30 p.m. (R. 760).

Prior to the imposition of sentence in a capital case, a trial court is required to:

a. Weigh aggravating and mitigating circumstances. Chapter 921.141(3) Florida Statutes, and

b. Consider and give great weight to the jury's sentencing recommendation. Tedder v. State, 322 So.2d 908 (Fla. 1975).

Part and parcel of (b) above, especially in cases in which the trial court is contemplating the imposition of a death sentence despite and in the face of a jury recommendation of life imprisonment, is the necessity of deciding that the life recommendation was one which reasonable persons would not have returned because the facts suggesting death are so clear and convincing. Tedder v. State, supra.

Appellant recognizes that a trial court can be weighing aggravating and mitigating circumstances prior to the receipt of the jury's recommendation. However, Appellant contends that a trial court can reach no firm decision as to sentence

until after receipt of the jury's recommendation because of the mandate of Tedder v. State, supra.

In Appellant's case, it is obvious that the trial court had decided to sentence Appellant to death before receipt of the jury's recommendation of a life sentence and thus gave no consideration, deference or weight to the recommendation. Such is clear from the short period of time which elapsed between receipt of the jury's recommendation and the commencement of the trial court's verbal dissertation preliminary to its pronouncement of sentence, the outcome of which was known only to the court at the outset. Within a span of eighteen minutes, the trial court received a jury recommendation that Appellant be sentenced to life imprisonment without possibility of parole for twenty-five years and adjourned court with a death sentence imposed.

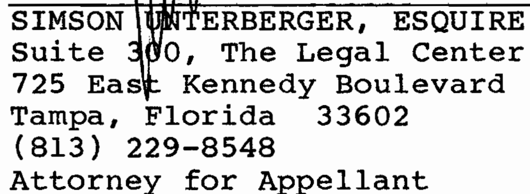
The aforedescribed sequence of events leads to the conclusion that the trial court precipitously and without proper deliberation upon a matter, to-wit: a jury's life sentence recommendation, entitled to be accorded great weight, sentenced Appellant to die in the electric chair. It

strains credibility to conclude that one person, confronted with the duty of deciding whether another should live or die, could have so rapidly determined that fully one-half of the people who made up Appellant's jury acted as no other reasonable people would have acted in recommending that Appellant receive a life, as opposed to a death, sentence. No person, jurist or otherwise, is entitled or should be permitted to so speedily discount the views of his fellows and peers on such a question. Can anyone be so confident of the correctness of his assessment of such a life and death situation that he can, as happened in this case, declare, in effect, the views of six persons to be unreasonable within a span of far less than eighteen minutes. Appellant believes not and thus contends that, in sentencing him to die, the trial court failed to give proper consideration to the jury's recommendation.

CONCLUSION

The primary thrust of his Brief is that the trial court should have sentenced Appellant, upon his conviction for

first degree murder, to life imprisonment, not to death in the electric chair. Accordingly, for all the reasons set forth in this Brief, Appellant's death sentence should be vacated and, for his conviction of first degree murder, a life sentence should be imposed.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Initial Brief of Appellant has been furnished, by mail, this 10 day of June, 1983, to Robert J. Landry, Esquire, Assistant Attorney General, 1313 Tampa Street, Suite 804, Tampa, Florida 33602.

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