IN THE SUPREME COURT OF THE STATE OF FLORIDA

ISAAC FLOYZELL THOMPSON	:	
Appellant	:	
vs.	:	Appellate Case No. 63,398
STATE OF FLORIDA	:	
Appellee	:	
	:	

REPLY BRIEF OF APPELLANT

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ARGUMENT UPON ISSUE NUMBER I

WHETHER APPELLANT WAIVED, FOR APPELLATE PURPOSES, THE ISSUE OF WHETHER OR NOT HIS CONVICTION FOR RESISTING ARREST WITH VIOLENCE CONSTITUTES AN AGGRAVATING CIRCUMSTANCE

In his initial Brief filed in this appeal, Appellant challenged the use of his prior conviction for resisting arrest with violence as an aggravating circumstance, for death sentencing purposes, under Chapter 921.141(5)(b) Florida Statutes.

In its Brief filed in this appeal, Appellee points out that the issue of whether or not a conviction for resisting arrest with violence constitutes an aggravating circumstance under Chapter 921.141(5)(b) Florida Statutes was never raised in the trial court. Accordingly, Appellee claims that the issue, for Appellant's purposes, has not been properly preserved and has thus been waived. In support of its claim, Appellee relies upon Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

In Steinhorst v. State, supra, defendant was on trial for first degree murder. During the initial phase of the trial, to-wit: that phase during which defendant's guilt or innocence would be determined, defendant's attorney attempted to cross-examine a witness concerning the witness' participation in a smuggling operation. The announced purpose of the proffered cross-examination was impeachment of credibility. For this purpose, the trial court sustained an objection to the cross-examination. On appeal, the defendant claimed that the purpose of the proposed cross-examination was to develop a theory of defense and thus it was error to prohibit the cross-examination. The appellate court refused to consider the question of whether or not the prohibiting of the cross-examination was error because the argument that its purpose was development of a theory of defense was not presented at trial and was thus, for the purpose of appeal, waived.

Steinhorst v. State, supra, is easily distinguishable from the situation in the case at hand. Steinhorst v. State involved waiver for failure to raise an issue during a trial

to determine guilt or innocence. In such a case, a court of appeal will not consider, and is not obligated to consider, issues not raised before the trial court unless the error is fundamental. Steinhorst v. State, supra. The issue which Appellee claims was waived by Appellant was not an issue arising during a trial upon Appellant's guilt or innocence but was an issue arising during that phase of his trial involving what sentence should be imposed him, his guilt having already been determined. In such a situation, both the conviction and the sentence "...shall be subject to automatic review by the Supreme Court of Florida..." Chapter 921.141(4) Florida Statutes. Such review, according to the United States Supreme Court in the case by which it upheld the constitutionality of Florida's death penalty statute requires that:

> "...the evidence of the aggravating and mitigating circumstance is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" (emphasis added), Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976).

In view of the preceding, it is difficult to understand how the question of whether or not a conviction of resisting arrest with violence constitutes an aggravating circumstance under Chapter 921.141(5)(b) Florida Statutes can be waived because not raised before the trial court when one of the factors which separates Florida's death penalty scheme from unconstitutionability is the requirement that there be an independent appellant review and outweighing of aggravating and mitigating circumstances.

For the reasons above stated, Appellant's position is that the question of whether or not a conviction for resisting arrest with violence constitutes an aggravating circumstance for penalty purposes in capital cases was and is arguable by him on this appeal from the imposition upon him of what the United States Supreme Court calls the "ultimate penalty."

ARGUMENT UPON ISSUE NUMBER II

WHETHER A CONVICTION OF RESISTING ARREST WITH VIOLENCE CONSTITUTES AN AGGRAVATING CIRCUMSTANCE UNDER CHAPTER 921.145(5)(b) FLORIDA STATUTES

In its Brief filed in this case, Appellee contends that the crime of resisting arrest with violence involves, as a matter of law, the use or threat of violence to the person so that conviction thereof automatically constitutes an aggravating circumstance under Chapter 921.141(5)(b) Florida Statutes. In support of this view, Appellee relies on Simmons v. State, 419 So.2d 316 (Fla. 1982).

In Simmons v. State, supra, it was decided that robbery, as a matter of law, is a crime involving use or threat of violence to the person. The basis of the ruling was twofold, to-wit:

(a) The confrontational aspects of the crime, and

(b) Its high life endangering potential.

With regard to (b) above, it was found to exist even in situations where a robbery was committed without violence or physical injury because of the conveyance to the victim by the perpetrator of a message that greater force will be applied in the event of resistance by the victim.

The ruling of Simmons v. State, supra, does not alter the view that resisting arrest without violence does not involve the use or threat of violence to the person. Though resisting arrest clearly has its confrontational aspects, it lacks the high life endangering potential inherent in the crime of robbery according to Simmons v. State, supra. This is demonstrated by State v. Green, 400 So.2d 1322 (Fla. 5th DCA 1981) in which Green wiggled and struggled to free himself from police officers who were trying to arrest him. Assuming that the wiggling and struggling were sufficient to constitute violence for the purpose of estabishing a charge of resisting arrest with violence, does such conduct have the same potential for endangering life as do those actions which constitute robbery? While Appellant concedes that resisting arrest can be committed in ways in which life could be

endangered, he nevertheless suggests that the endangerment to life in a resisting arrest with violence is low as opposed to robbery wherein it has been judicially decided that the potential for endangerment to life is high. On this point, it should be noted that the confrontational crimes where the danger to life is high typically carry penalties far more severe than that imposable for resisting arrest with violence. Resisting arrest with violence is a third degree felony punishable by up to five years in jail. All the other confrontational crimes like sexual battery, robbery and aggravated battery carry potential jail sentences at least three times harsher than that which can be imposed for resisting arrest with violence. Certainly, the Legislature so set forth penalties for sexual battery, robbery and aggravated battery because of its recognition that these crimes are highly dangerous to human life. And, by the same token, the Legislature, in setting the maximum penalty for resisting arrest with violence, must have done so in recognition that the potential for endangerment to life from the commission of resisting arrest with violence was much

less than when the crime committed is sexual battery, robbery or aggravated battery.

In view of the preceding, Appellant contends that resisting arrest with violence, unlike robbery, is not inherently a crime involving the use or threat of violence to the person for the purposes of Chapter 921.141(5)(b) Florida Statutes. Accordingly, it was error for the trial court in Appellant's case to have found the existence of the aggravating circumstance of Chapter 921.141(5)(b) Florida Statutes from the mere previous conviction of Appellant for resisting arrest with violence.

ARGUMENT UPON ISSUE NUMBER III

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

Appellant, armed with a shotgun, approached his victim, a gas station attendant, and asked for his money. After the victim advised tht he had no money, the victim picked up a

chair, laughed and was shot by Appellant. Do these facts demonstrate that Appellant shot the victim in a cold, calculated fashion without pretense or moral or legal justification?

The answer to the question is no when the facts of Appellant's case are compared with those of Magill v. State, 386 So.2d 1188 (Fla. 1980), Combs v. State, 403 So.2d 418 (Fla. 1981), and Hill v. State, 422 So.2d 816 (Fla. 1982).

In Magill v. State, supra, the victim, after being robbed, kidnapped and raped, was then shot in the head and after falling to the ground was shot twice more. Appellant's situation differs from that of Magill v. State, supra, in that:

(a) The length of time that Appellant's victim was exposed to Appellant was for less than the length of time Magill's victim was exposed to Magill.

(b) The length of time that Appellant had to contemplate what he was going to do to his victim was far less than the length of time Magill had to so contemplate.

(c) Magill's victim was shot after being rendered helpless and such was not the case with Appellant's victim.

(d) Magill's victim suffered multiple gunshots whereas Appellant's victim was only shot one time.

In Combs v. State, supra, Combs lured Perry and Parks into the woods and held them there at gunshot. After demanding money and cocaine from Perry and Parks, he only got cocaine which had been thrown several feet from him with the instruction from Parks to go find it. Having been angered by this, Combs advised that he was going to shoot Perry just so Parks (Perry's girlfriend) could watch Perry die. Thereafter, Parks began to cry and, after the exchange by Perry and Parks of declarations of love, Combs shot Parks in the head three times. Appellant's situation differs from that of Combs v. State, supra, in that:

(a) The length of time Appellant's victim was exposed to Appellant was for less than the length of time Parks was exposed to Combs.

(b) The length of time Appellant had to contemplate what he was going to do to his victim was far less than the

length of time Combs had to so contemplate.

(c) Combs advised his victim of the possibility that he would be killing someone well in advance of his actually killing someone whereas no such advice was ever conveyed by Appellant to his victim.

(d) Combs victim suffered multiple gunshot wounds whereas Appellant's victim was only shot once.

(e) Combs' action caused Parks to contemplate the possibility of death for an extended period, whereas Appellant's victim could have only contemplated such a possibility for a moment.

In Hill v. State, supra, Hill planned to first rape and then kill his victim. Hill carried out his plan. Appellant's situation differs from that of Hill v. State, supra, in that:

(a) The length of time Appellant's victim was exposed to Appellant was for less than the length of time Hill's victim was exposed to Hill.

(b) Hill contemplated the murder of his victim for a long period of time whereas Appellant did not contemplate

the death of his victim for more than a moment.

The murder which was the subject was Magill v. State, supra, was deemed to be cold, calculated, etc. because:

> "The record is clear that defendant had a cold, calculated design to effect the death of a helpless victim."

The murder which was the subject of Combs v. State, supra, was deemed to be cold, calculated, etc. because:

> "The evidence is overwhelming that the murder was 'committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.'"

The murder which was the subject of Hill v. State, supra, was deemed to be cold, calculated, etc. because:

> "Further, the record shows that Appellant's state of mind was such that he intended to rape and then murder the victim and that he made this decision substantially before the time he picked her up."

Though he has great difficulty in deciphering which murders committed with a "premeditated design to effect the death" of another are cold, calculated, etc. and which are not, it would appear that the key factor is the length of time the perpetrator contemplated his crime prior to its commission. Apparently, the longer the period of

contemplation the more likely the murder will be deemed cold, calculated and without the necessary pretenses. In McCray v. State, 416 So.2d 804 (Fla. 1982), McCray jumped from his car with gun obviously in hand, approached a vehicle occupied by the victim and shot the victim three times in the abdomen after yelling, "This is for you, mother fucker." Certainly, McCray's act was contemplated for more than a slight period prior to its commission, since he had to jump from his car, approach the victim, yell the epithet and fire the gun three times. But apparently because the period of contemplation was not lengthy, McCray's crime was not deemed to be cold, calculated, etc.

Such is the situation with regard to Appellant. While there is evidence that he planned well in advance to rob his victim, there is no evidence that the planning included killing the victim. With regard to the killing itself, the evidence demonstrates that the decision to kill was made only after the victim advised he had no monies to give to Appellant, and thus because the shooting occurred within only a moment or moments after Appellant was so advised, the period

during which killing was contemplated was very short.

It was because of an analysis of the facts of Appellant's case and other cases cited herein that Appellant argued, in his initial Brief, that his case more resembled McCray v. State, supra, than said other cases, and that therefore his crime was not one committed in a cold and calculated manner without pretense of moral and legal justification for the purposes of Chapter 921.141(5)(i) Florida Statutes.

Accordingly, Appellant continues to claim that the trial court erred in concluding that the aggravating circumstance found in Chapter 921.141(5)(i) Florida Statutes was proven in his case.

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

In response to Appellant's already expressed position on this issue, Appellee does everything but concede that the trial curt had decided to impose a death sentence upon Appellant before receipt of the jury's sentencing recommendation. According to Appellee, such is permissible when, as it contends occurred in the case at hand, the trial court weighs aggravating and mitigating circumstances while such is being done by the jury and does so in anticipation of a jury recommendation of a life sentence.

If such be the case, the effect is to nullify the principle announced in Tedder v. State, 322 So.2d 908 (Fla. 1975), to-wit:

> "A jury recommendation...should be given great weight."

How can any weight be given to something before it exists? It can't.

It is obvious to Appellant that the Florida Supreme Court promulgated the aforesaid principle in recognition of the gravity of a decision to impose a death sentence, and because it felt that such a decision should not be precipitously made and should only be made after considering the collective position of those of Appellant's peers most familiar with the facts and circumstances of his case. That such must have been the purpose in promulgating the principle is obvious from the second principle announced in Tedder v. State, supra, to-wit: 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."

From the promulgation of this second principle, it is obvious that the Florida Supreme Court would only permit the overriding of a life sentence recommendation in only the most extreme of situations, that is, when the recommendation is wholly unreasonable. How a trial judge can so conclude

before receiving the recommendation is virtually impossible. If a trial judge concludes on his own before receipt of a jury's sentencing recommendation that no reasonable persons could dispute that death is proper sentence, how could he continue to hold such a position without reevaluating it, if, for example, the jury recommended a life sentence by a vote of 12-0. No judge in his right mind could or should be allowed to disregard without further reconsideration of his own view, a unanamous jury sentencing recommendation of life.

Yet, such is what is advocated by Appellee in its brief when its position is carried to its ultimate application.

It's difficult to believe that reasonable persons could reach a conclusion other than that the trial court, in Appellant's case, decided on a death sentence prior to rendition of the jury's sentencing recommendation and thus without according it the weight required by Tedder v. State, supra. Such constitutes precipitous trial court conduct which is violative of the purpose and spirit of Chapter 921.141(3) Florida Statutes as interpreted by the Florida Supreme Court in Tedder v. State, supra.

As an aside to all of the preceding, Appellant notes with interest that on February 11, 1983, at 6:12 p.m. Appellant's jury returned its recommendation of a life sentence. (R. 755). Between 6:12 p.m. and 6:30 p.m. on that date, the trial court sentenced Appellant to death and adjourned court. (R. 757-760). February 11, 1983, was a Friday. Thus, court was adjourned at 6:30 p.m. on a Friday night. The trial court's written findings in support of the death sentence it imposed were filed on February 11, 1983. Though the time of filing is not noted, the foregoing leaves one to wonder whether:

(a) The written findings were prepared prior to 6:30 p.m. on February 11, 1983, or

(b) The written findings were prepared after 6:30 p.m. on a Friday night.

Considering the less than eighteen minute time span between receipt of the jury's sentencing recommendation and the imposition of a death sentence upon Appellant, and thus the obvious lack of trial court deliberation in view of the recommendation, it would seem likely that the written

findings were prepared in advance of sentencing. If such be the situation, it only strengthens Appellant's view that the sentence was precipitously imposed without due consideration of the jury's life sentence recommendation.

ARGUMENT UPON ISSUE NUMBER V

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

Chapter 921.141(3) Florida Statutes permits the imposition of a death sentence by a trial court despite a jury recommendation of a life sentence. However, such is permissible only when "the facts suggesting death are so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908 (Fla. 1975).

Appellee, in its response to the above issue, argues that the prerequisite to imposing a death sentence in the face of a life sentence recommendation announced in Tedder v. State, supra, creates a problem, because it overemphasizes

the jury's function in relationship to a trial court's role as actual sentencer and thus, in some mysterious way, renders the jury the sentencer.

The lending of any credence to Appellee's position would make a mockery of the entire Florida capital case sentencing scheme by virtually nullifying the penalty view of twelve of the accused's supposed peers in cases, to-wit: capital cases, which have repeatedly been declared to be so different from any other type of criminal cases as to require special and extraordinary handling so that mistakes will not be made. Unlike the penalty imposed in any other type of criminal case, there is no return from a sentencing mistake in a capital case.

Perhaps in recognition of its rather foolish comments on the rationale and purpose of the principle established by Tedder v. State, supra, Appellee goes on to argue that even under the preseent state of the law, the imposition of the death penalty upon Appellant was proper under the circumstances of his case. The basis of this argument is the conclusionary view that the trial court properly found three

aggravating and no mitigating circumstances and that the aggravating circumstances outweighed any, presumably statutory, mitigating circumstances which Appellant's jury may have considered. Why any of this is so, Appellee does not care to say. And, of course, by so expressing its view in purely conclusionary terms, Appellee avoids the task of attempting to address certain questions, to-wit:

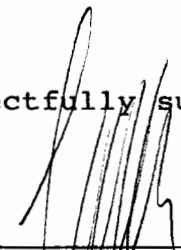
(a) Why the nonstatutory mitigating circumstances cited by Appellant in his initial brief do not outweigh the aggravating circumstances found by the trial court, and

(b) Why the jury's action in recommending a life sentence was an act which virtually no reasonable person would have committed.

When it is "impossible to say that there was no reasonable basis for the jury to have concluded that some mitigating circumstances existed sufficient to outweigh the aggravating circumstances," Shue v. State, 366 So.2d 387 (Fla. 1978), the jury's sentencing recommendation should be followed. Such an impossibility exists in Appellant's case because of the wealth of evidence of nonstatutory mitigating

circumstances presented during the penalty phase of his trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished, by mail, this 24th day of August, 1983, to Robert J. Landry, Esquire, Assistant Attorney General, 1313 North Tampa Street, Tampa, Florida 33602.

SIMSON UNTERBERGER, ESQUIRE