IN THE SUPREME COURT OF FLORIDA

JUAN F. RAMOS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 63,444

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

ARGUMENT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE TESTIMONY WITH REGARD TO THE DOG-SCENT DISCRIMINATION LINE-UPS.

Appellee claims that sufficient predicate was laid by which the reliability of the dog-scent testing of Harass II was admissible. This claim, interestingly enough is made solely by reference to the dog's trainer, John Preston and one Kenneth Stayer whose only exposure to and training in the field of dog training is from John Preston. This can hardly be considered sufficient corroborative evidence since the thrust of defense counsel's attack on the admissibility of this evidence was the lack of controls on the testing and Preston's unwillingness to have the testing documented. Appellant respectfully submits that given the technological advances over the past 40 years, this Court should reconsider its holding in Tomlinson v. State, 129 Fla. 658, 176 So. 543 (1937) and set forth proper safeguards and standards regarding the admissibility of dog scent testimony.

By way of analogy, one needs only to consider the issue of breath preservation in drunk driving prosecutions. In State v. Shutt, 363 A.2d 406 (N.H. 1976), the Supreme Court of New Hampshire held there was no duty on the State to perform an additional breath test for the defendant's personal use and there was no denial of due process. A mere six years later in State v. Cornelius, 425 A.2d 464 (N.H. 1982) the same Court stated:

> The evidence before us indicates that since Shutt was decided, advances in technology have occurred, making it possible for the state, at reasonable expense, to make and preserve an additional breath sample or its functional equivalent, for the defendant's later use, and for information of some value to be otained from "used" ampules. We are not prepared, however, to conclude that a statute and the procedures employed in its implementation, which passed constitutional muster in 1976, have because of these technological advances become constitutionally infirm in 1982. Is is sufficient to emphasize that as technological advances occur, the use of which by the law enforcement authorities will better enable the state to make more meaningful and real the rights guaranteed citizens under our constitution, the dictates of basic fairness may require that the state avail itself of such technology.

Applying this to the instant case, it is clear that since 1937 when Tomlinson, supra was decided, vast advances in technology have occurred. As suggested by defense counsel, the simple precaution of video taping scent line-ups would at least provide some control and means for having such tests evaluated by other experts. Without this simple measures of control, an accused is denied fundamental due process, since clearly it is impossible to

cross-examine a dog. More particularly, in the instant case, during the scent discrimination line-up concerning the knives, Harass II approached the knife found imbedded in the victim and actually licked it. (R 1139, 911) During the suppression hearing, Preston very definitely stated that Harass has never licked an item and he has no idea what such an action indicates. (R 1875-1876) This illustrates the highly questionable reliability of such tests and emphasizes the need for adequate controls before such evidence is ruled admissible.

In the instant case, the denial of due process is emphasized even more by the fact that Preston was recalling the results of these tests some nine (9) months after they occurred, apparently from memory. Preston testified that he never takes notes when he conducts such tests nor does he make reports. In calendar year 1981, Preston was conducting tests for all but about forty days out of the year. (R 1296) Yet, he never made a written record of his test results! As a result an accused is basically at his mercy, unable to test either the dog's ability or Preston's procedure.

Appellee cites Edwards v. State, 390 So.2d 1239 (Fla. 1st DCA 1980) wherein the Court applying the Tomlinson rule, affirmed a conviction based in part on the admission of dog trailing evidence. However, there are several important distinctions between Edwards, supra and the instant case. The tracking by the dog in Edwards, supra, was done two hours after the offense was committed, while in the instant case, the scent line-ups were conducted one week after the death of Sue Cobb.

The dog in Edwards, supra, was put on a trail which the police officers had been visually tracking, which in a sense merely corroborated what the officers already knew. In the instant case, the dog scent evidence was the major if not sole evidence upon which Appellant was convicted. The importance was underscored when the jury returned with a question concerning whether such evidence had ever been proven wrong in any court. (R 1605) Due process dictates that this Court reverse Appellant's convictions.

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ALLOWING AN INCOMPETENT STATE WITNESS TO TESTIFY CONCERNING IRRELEVANT, INACCURATE INFORMATION, AND IN NOT DISSPELLING THE IMPRESSION THAT THE JURY RECEIVED AS A RESULT, THEREBY DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW.

Appellee's attempt to justify the trial court's allowance of the state to elicit from John Preston that other state appellate courts have affirmed convictions based on his testimony strains the bounds of logic. Initially, Appellee echoes the familiar cry that this issue is not preserved for appeal since the initial question to which defense counsel objected was not answered and no further objections were made. Appellee ignores the fact that the trial court overruled Appellant's objection. (R 1238) The subsequent questions merely elicited the same testimony. Certainly, defense counsel was not required to pursue an obviously fruitless cause of action. Once the objection was overruled and the court permitted the objectionable testimony, the issue was preserved for review.

Next, Appellee suggests that the inquiry was elicited merely for the "trial court's edification" to help him evaluate Preston's credentials. This assertion ignores the fact that the trial court was already completely familiar with Preston's credentials and would have qualified him as an expert with very little supporting testimony as evidenced by his statements during the hearing on the motion to suppress. (R 1828)

Very recently in Dedge v. State, ___ So.2d ___, 9 FLW 17 (Fla. 5th DCA Case No. 82-1349, 12/22/83) a conviction based largely on the evidence of scent discrimination tests by Harass II (the same dog as in the instant case) was reversed for much the same error as was committed sub judice. In Dedge, supra, Preston was permitted to testify over objection that an established author and expert in the filed of human scent discrimination, L. Wilson Davis, had previously testified as to the reliability of Harass II. The Court found such testimony to be inadmissible hearsay. The same is true of the testimony regarding other state appellate decisions. Like the court found in Dedge, supra, the error is not harmless since Harass II's abilities were the key to identification of Appellant. Reversal is mandated.

POINT XI

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN SENTENCING RAMOS TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, BECAUSE THE FACTS SUGGESTING DEATH AS AN APPROPRIATE PENALTY WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

Appellee's basic argument supporting the jury override in the instant case is the fact that four (4) aggravating circumstances and no mitigating circumstances were found by the trial court. Appellee's argument misses the thrust of this issue: the jury composed of twelve reasonable persons who heard the exact same evidence as did the trial court determined that this particular murder when compared to other murders did not warrant imposition of the death penalty. Appellee places immense emphasis on the heinousness of this murder. Appellee's emphasis in this regard is understandable since the importance of the presence or absence of the "especially heinous, atrocious, or cruel" circumstance to the question of whether the jury's life recommendation, or the trial court's override and death sentence, will be sustained by this Court cannot be overstated. Contrast Buford v. State, 403 So.2d 943, 954 (Fla. 1981) (recognizing that the trial court in that case, and in previous "life override" cases in which imposition of the death penalty was affirmed by this Court, was "unquestionably...swayed by the extreme heinousness and atrociousness of the crimes") with Tedder v. State, 322 So.2d 908, 910 (1975); Williams v. State, 386 So.2d 538, 543 (Fla. 1980); Odom v. State, 403 So.2d 936, 942 (Fla. 1981); McCray v. State, 416 So.2d 804, 807 (Fla. 1982); and Herzog v. State, 439

So.2d 1372 (Fla. 1983) (In each of which this Court held that the trial court's finding of "especially heinous, atrocious, or cruel" was invalid, and in each of which the death penalty was reversed and the case remanded with instructions to impose a life sentence in accordance with the jury's recommendation). The significance of the "especially heinous, atrocious, or cruel" circumstance to the propriety of a trial court's "life override" is even more clearly illustrated by the following: of the 59 life override cases which have been decided to date by this Court, the death sentence had been approved in 21 of them.[1] Of those 21 cases, the "especially heinous, atrocious or cruel" circumstance was found by the trial court in 20 of them. Of the latter 20 cases, this Court upheld the finding of "especially

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[1] The cases in which this Court has affirmed the death penalty after the trial court's rejection of the jury's life recommendation are:

1. Sawyer v. State, 313 So.2d 680 (Fla. 1975)
2. Gardner v. State, 313 So.2d 675 (FLa. 1975
3. Douglas v. State, 328 So.2d 18 (Fla. 1976)
4. Barclay v. State (Barclay), 343 So.2d 1266 (Fla. 1977)
5. Barclay v. State (Dougan), 343 So.2d 1266 (Fla. 1977)
6. Hoy v. State, 353 So.2d 826 (FLa. 1977)
7. Dobbert v. State, 375 So.2d 1069 (Fla. 1979)
8. Johnson v. State, 393 So.2d 1069 (Fla. 1980)
9. McCrae v. State, 395 So.2d 1145 (Fla. 1980)
10. Ziegler v. State, 402 So.2d 365 (Fla. 1981)
11. White v. State, 403 So.2d 331 (Fla. 1981)
12. Buford v. State, 403 So.2d 943 (Fla. 1981)
13. Miller v. State, 415 So.2d 1262 (Fla. 1982)
14. Stevens v. State, 419 So.2d 1058 (Fla. 1982)
15. Bolender v. State, 422 So.2d 833 (Fla. 1982)
16. Porter v. State, 429 So.2d 293 (Fla. 1983)
17. Spaziano v. State, 433 So.2d 508 (Fla. 1983)
18. Engle v. State, 438 So.2d 803 (Fla. 1983)
    (life override approved but remanded on other grounds)
19. Routly v. State, 440 So.2d 1257 (Fla. 1983)
20. Lusk v. State, __ So.2d __, 9 FLW 39
    (S.Ct. Case No. 59,146, 1/26/84)
21. Heiney v. State, __ So.2d __, 9 FLW 54
    (S.Ct. Case No. 56,778, 2/2/84)

heinous, atrocious, or cruel" in 19 of them, and possibly all 20. [In Ziegler v. State, supra, in which four people were murdered, the trial court found the murders of Eunice Ziegler and Charles Mays to be especially heinous, atrocious, and evil; this Court determined that under the totality of the circumstances of this mass murder it was "immaterial" whether this finding was applicable to the murder of Eunice Ziegler, and expressed no opinion as to its applicability to the murder of Mays]. The only "life override" case which has been affirmed by this Court in the absence of a finding that the murder was especially heinous, atrocious, or cruel was Sawyer v. State, supra. Sawyer was the earliest life override case in which this Court affirmed the death penalty. Anthony Sawyer's sentence was subsequently mitigated to life imprisonment by the trial judge. And in his concurring opinion in Witt v. State, 387 So.2d 922, 931 (Fla. 1980), Justice England observed that if Sawyer's case were reviewed under the standards subsequently developed, his death sentence would in all probability be vacated. All 20 subsequent decisions (with the possible exception of Ziegler) in which this Court approved a life override involved murders which were especially heinous, atrocious, or cruel -- murder "accompanied by such additional acts as to set the crimes apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Lewis v. State, 398 So.2d 432, 438 (Fla. 1981). The cases in which the death penalty was affirmed notwithstanding the jury's recommendation of life virtually

always contained one or more of the following factors which go into the "heinous, atrocious, or cruel" equation -- sexual assault (see Gardner, Douglas, Hoy, McCrae, Miller, Buford, Stevens, and Engle]; children or elderly people as victims [see Dobbert, McCrae, Buford, and Porter]; extreme physical brutality or torture [see Gardner, Dobbert, McCrae, Miller, Stevens, Bolender, Spaziano, and Engle]; and extreme mental anguish in anticipation of death [see Barclay, Hoy, White, Buford, and Routly]. Several of the cases involved multiple murders [see Hoy, Ziegler, White, Bolender, and Porter].

In the instant case, the jury heard the evidence and saw the photos of the victim. They were also instructed on the aggravating circumstances including heinous, atrocious and cruel. (R 2224) As discussed in the initial brief, there is a reasonable likelihood that the jury properly applied the law to the evidence and determined that the state failed to prove any of the aggravating circumstances beyond a reasonable doubt. It bears repeating, that no additional evidence was known to the trial court that was not also known to the jury. Simply stated, Juan Ramos' death sentence cannot stand.

CONCLUSION

Based on the foregoing reasons and authorities cited herein and in the initial brief, Appellant respectfully requests this Honorable Court to reverse his judgment and sentence and to grant the following relief:

As to point I-VII remand for a new trial.

As to point VIII remand for re-sentencing.

As to point IX-XI remand for imposition of life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Jim Smith, Attorney General, in his basket at the Fifth District Court of Appeal, and mailed to Mr. Juan F. Ramos, Inmate No. 088561, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 6th day of March, 1984.

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