IN THE SUPREME COURT OF FLORIDA

GERALD EUGENE STANO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 63,947

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

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

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GERALD EUGENE STANO, Appellant,	)	
vs.	)	CASE NO. 63,947
STATE OF FLORIDA, Appellee.	)	

REPLY BRIEF OF APPELLANT

ARGUMENT

POINT I

APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED IN VIOLATION OF THE STATUTE, ARTICLE I, SECTIONS IX AND XVII OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

(A) Introduction: In reply to the state's contention that the penalty of death is appropriate based upon the trial court's finding of six previous first degree murder convictions.

Appellee correctly points out that the trial court stated in its written findings of facts that the aggravating circumstance set forth in §921.141(5)(b), Fla.Stat. (1981) would justify imposition of the death penalty by itself. (R 624-625; SR 6) The state places great emphasis on this portion of the trial court's written findings. See Appellee's Brief pages 3-5. Although Appellant concedes the applicability of this aggravating circumstance, contrary to Appellee's assertion, Appellant does

not concede that the circumstance was properly applied. While the trial judge did state that this aggravating factor alone would outweigh the mitigating factors, this Court should review that finding to determine if it is a proper one. Otherwise, a trial judge could simply recite these magic words as to each aggravating factor to assure affirmance on appeal. Appellant submits that the trial judge's conclusion in this regard is not a "reasoned judgment as to what factual situations require imposition of death" as required in State v. Dixon, 283 So.2d 1 (Fla. 1973).

(B) In reply to the state and in support of the contention that as to both cases, mitigating factors, not found by the trial court, were present and the mitigating factors which were found were given improper weight, thus violating Appellant's constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

While Appellee is correct in his assertion that the court resolved the conflicts in the evidence adversely to the appellant, Appellee overlooks Appellant's assertion in the initial brief regarding the improper basis for the trial court's conclusion. Doctor Carrera's testimony in misconstruing the statute's definition of "substantial impairment" misled the trial court in finding that this mitigating circumstance had not been established. (R 121-128) Appellant also pointed out the extreme thoroughness of the appellant's expert witnesses compared to the psychiatrist who sided with the state's point of view. The factors lead to the inescapeable conclusion that the trial court improperly resolved the conflicts in the evidence against the appellant.

Appellee also contends that there is no indication that the trial court made any error in determining the applicability of §921.141(6)(f), Fla.Stat. (1981). See Appellee's Brief page 9. Appellant submits that the trial court's specific adoption and approval of the testimony of doctors Carrera and Barnard indicates that the trial court also accepted the improper statutory standard employed by Dr. Carrera. Likewise, the trial court's act in overruling objections to certain portions of Dr. Carrera's testimony which Dr. Carrera himself characterized as "speculative" (R 139), indicates that the trial court improperly relied upon this testimony in reaching its ultimate conclusion. This was clearly error.

Appellant also objects to the trial court's failure to cite any reason for the "little weight" given to the three non-statutory mitigating factors found. Appellee appears to argue that this conclusion is self-evident given the nature of the crimes. See Appellee's Brief page 11. Appellant submits that the trial court's failure to cite any reasons results in error. Otherwise, a trial court could simply recite these "magic words" in all cases to assure affirmance.

Also, this Court has recently held that a defendant's emotional and mental problems affect the weight given the mitigating factors found. Michael v. State, 437 So.2d 138 (Fla. 1983). Hence, given the strong evidence of Appellant's mental condition, it was error for the trial court to give "little weight" to the three non-statutory mitigating factors that were found.

(C) In reply to the state and in support of the contention that as to both murders, the trial court erred in finding the existence of aggravating circumstance (i) resulting in a denial of Appellant's constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

Appellant's contention in the initial brief that the appellant acted as a result of extreme anger is supported by the mental health professionals' testimony in this regard. Appellee responds that, "It is wholly conceivable that one affected by extreme anger may still be capable of plotting and executing a violent murder." See Appellee's Brief page 16. Appellee then continues to construct a scenario in which Appellee engages in pure speculation regarding the operation of Appellant's mental process. Appellant wishes to point out that aggravating circumstances must be proven beyond a reasonable doubt and, as such, cannot be the subject of such speculation. State v. Dixon, 283 So.2d 1 (Fla. 1973). Similar speculation occurs on the part of the trial court in determining that there was "no doubt" that Stano knew what he was ultimately going to do with Ms. Muldoon. (SR 4-5) Appellant submits that this is also speculation contrary to the requirements of Dixon.

Appellee's attempt to justify the trial court's doubling of factors in establishing separate aggravating circumstances constitutes a distinction without a difference. See Appellee's Brief page 17. Despite Appellee's argument, the trial court did utilize one aspect of the case in an attempt to establish two or more different aggravating circumstances. This clearly violates the dictates of Provence v. State, 337 So.2d 783 (Fla. 1976).

Appellee also contends that it is the trial court's determination whether the argument of the prosecutor regarding the operation of the murder weapon constitutes a permissible inference. See Appellee's Brief page 20. Secondly, Appellee submits that there is no indication that the trial court relied upon this inference to support its ultimate conclusion. Appellant submits that this Court can clearly review the trial court's determination on this issue in light of the specific and timely objection by defense counsel. (R 247-248) As for Appellee's second assertion, Appellant contends that the trial court's action in overruling the objection and in allowing the argument is certainly highly persuasive evidence that the trial court obviously considered and thus relied upon this improper argument.

(D) In reply to the state and in support of the contention that as to both murders, the trial judge incorrectly found aggravating circumstance (h), thus violating Appellant's constitutional rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution.

Appellee's suggestion that, "Given Ms. Bickrest's argumentative nature, it is likely in any event that her death was not a quiet, submissive one" (See Appellee's Brief page 27), constitutes unadulterated conjecture. As such, it does not reach the requisite standard of proof of beyond a reasonable doubt for aggravating circumstances as required by State v. Dixon, 283 So.2d 1 (Fla. 1973).

Contrary to Appellee's assertion, Appellant is not asking this Court to reweigh and evaluate the evidence to determine whether or not Ms. Bickrest was in fact "beaten". See Appellee's Brief page 27. Rather, Appellant contends that there is not sufficient, competent evidence introduced below to support this finding by the trial court.

Appellee's reliance upon Waterhouse v. State, 429 So.2d 301 (Fla. 1983) for the contention that no impermissible "doubling" occurred is clearly misplaced. Waterhouse, supra, involved a trial court relying upon both the defendant's prior conviction of a violent felony and his status as a parolee. Waterhouse, supra, pointed out that these were two separate and distinct characteristics of the defendant and were not based on the same evidence and the same essential facts. (emphasis added) In the instant case, it is clear that the aggravating circumstances were based, at least in part, on the same evidence and the same essential facts. Thus it is clear that impermissible doubling did occur.

Appellee submits that the appellant should not benefit from this Court's recent decision in Pope v. State, 8 FLW 425 (Fla. October 27, 1983) wherein this Court held that "Henceforth lack of remorse should have no place in the consideration of aggravating factors." 8 FLW at 427. Emphasizing the word "henceforth", Appellee contends that reversal is not required since the trial judge's sentencing order predated the Pope decision. See Appellee's Brief page 29.

Appellant must disagree with Appellee's conclusion. While Pope, supra, is a recent case, it merely clarified this Court's decision in Sireci v. State, 399 So.2d 964 (Fla. 1981). Hence, Appellant submits that Pope, supra, merely clarified the existing law on this issue rather than establishing new law. Therefore, it must be applied retroactively. Furthermore, Appellant submits that it would be fundamentally unfair to limit the application of Pope, supra, to defendants whose sentencing orders predate the issuance of this Court's opinion.

Appellee submits that the circumstances as to each of the two murders did deviate from the norm of capital felonies. See Appellee's Brief pages 30-31. Appellant contends that they did not. Appellant submits that Appellee is more concerned with the number of murders committed by the appellant rather than the manner in which these two murders were accomplished. This Court should not fall into the same trap.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS GUARANTEED UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 16 AND 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PRECLUDE IMPOSITION OF THE DEATH SENTENCE AND IN SENTENCING HIM TO THE ULTIMATE SANCTION.

Appellant concedes that the recent decision of the United States Supreme Court in Tulley v. Harris, 52 U.S.L.W. 4141 (January 23, 1984, U.S.S.Ct. Case No. 82-1095) appears to preclude any United States Constitutional claim that the trial court erred in denying the motion to preclude imposition of the death penalty. In its decision, the United States Supreme Court pointed out that some states' statutory schemes provide for such a proportionality review. However, the Court went on to hold that, while such provisions do pass constitutional muster, this does not necessarily mean that such review is indispensable for constitutional purposes. Id. at page 4143.

Appellant submits that a claim under the Florida Constitution on this issue is still a valid one. In Tulley v. Harris, supra, the Court pointed out that the Florida Supreme Court routinely performs proportionality review despite the absence of a statutory requirement. Id. Appellant submits that this Court should continue to do so in the instant case. Appellant submits that the only logical decision in this regard mandates imposition of a life sentence as to each of the two instant cases in light of the trial courts' treatment of the appellant in other factually identical cases.

Appellee's assertion that any proportionality review should only include cases wherein the death penalty has been imposed lacks merit. Proffitt v. Florida, 428 U.S. 242, 253 (1976) pointed out that the Florida Supreme Court in State v. Dixon, 283 So.2d 1 (Fla. 1973), promises review to ensure that decisions are consistent with other sentences imposed in similar circumstances. No distinction is drawn to limit the review to other cases involving sentences of death. Appellant submits that review of sentences imposed in similar circumstances should include exactly that; namely cases involving similar circumstances with a comparison of whatever sentence was received in that case. Justice and fundamental fairness require this course of action.

CONCLUSION

Based upon the foregoing cases, authorities and policies cited herein and in the Initial Brief, Appellant respectfully requests that this Honorable Court vacate each of the two (2) death sentences and remand to the lower court with instructions to sentence Gerald Stano to life imprisonment on both cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered to the Honorable Jim Smith, Attorney General, in his basket at the Fifth District Court of Appeal, and a copy mailed to Mr. Gerald Eugene Stano, Inmate No. 079701, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 16th day of March, 1984.

CHRISTOPHER S. QUARLES
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