IN THE SUPREME COURT OF FLORIDA

FILED
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CLERK, SUPREME COURT
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JAMES FRANKLIN ROSE,)

Appellant,)

vs.) CASE NO: 63,996

STATE OF FLORIDA,)

Appellee.)

REPLY BRIEF OF APPELLANT

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AUTHORITIES CITED

STATEMENT OF THE FACTS

The original jury did vote and arrive at a six-six tie on penalty which was reported to the court because it could not be broken (OR-1301-1302). The court directed the jury to break the tie if possible. The tie vote was reported orally to the court and was reported in a written statement to the court from the jury asking for instructions. If allowed to return the vote in the form of a usual verdict, the original jury would have done so.

ISSUE I

The state provides an incomplete quotation from the voir dire of Ms. Marcus. Pages 210 and 211 of the record show the juror stated that she would be uncomfortable to recommend the death penalty under the circumstances suggested by the prosecuting attorney in the voir dire (R-210). She would "prefer" not to have to sit (R-21). Her answers were not sufficient for excusal for cause. The state did not move to excuse her for cause. The trial court never ruled that an excuse for cause was appropriate.

The cases cited by the state refer to instances in which a challenge for cause was made while this case concerns the use of a peremptory challenge.

Since the trial court cannot review the prosecutor's use of the peremptory challenge, there would be no basis for appellant to object to the state's use of a peremptory challenge. Only an appellate court can review the overall voir dire use of peremptory challenges. This Court can ascertain that the peremptory challenge privilege was used to exclude the only

person in the venire who represented the cognizable group within our society of persons able to follow the law but who have reservations about the broadest use of the death penalty. Such persons were not represented on this jury due solely to the peremptory challenge. The interests of justice require a new penalty recommendation.

ISSUE II

It is incorrect to state that the theory on which the conviction may have been based was irrelevant simply because the state was not attempting to prove that the murder was heinous, atrocious or cruel. Under Lockett v. Ohio, 438 U.S 586 (1978), circumstances of the offense which are offered as a mitigating circumstance, to support a sentence less than death, are indeed relevant to the sentencing decision. Issues relevant to the sentencing decision are appropriately considered by the jury during the advisory proceeding under Section 921.141, Florida Statutes.

The prejudice to the appellant in the failure of the trial court to instruct the jury on the basic definition of first degree murder is that this jury did not have any knowledge of how the facts and the law went together. The jury could not evaluate the circumstances of the offense which appellant offered to support a sentence less than death. The non-premeditated killing under circumstances substituting for premeditation, felony-murder, can be mitigating. Appellant should have been permitted to have the jury fully evaluate the circumstances in light of the applicable law. There should be no risk that the

death penalty is imposed when mitigating circumstances exist which are not considered. Eddings v. Oklahoma, 455 U.S. 104 (1982), at 119, Justice O'Connor, concurring.

ISSUE III

Since appellant was attempting to have the jury consider the circumstantial nature of the case, and the evidence and lack of it to show premeditated murder, instruction on the definitions of murder in the first degree and on the circumstantial evidence rule was necessary for the jury to evaluate the evidence. Under instructions on the legal significance of certain facts, the jury could have weighed whether the circumstances included the possibility that appellant accidentally caused the fatal injuries to the victim while engaged in kidnapping due to lack of parental consent under Section 787.01(1)(b), Florida Statutes (1975). The jury would have been entitled to conclude that a kidnapping felony and felony murder committed under such circumstances was a crime less than the most aggravated and unmitigated of capital felonies. The jury was precluded from doing so by the fact that the judge completely prevented the jury from having this information. As such the penalty proceeding was unfair and the recommendation of death should be discarded.

Appellee's statement that the prosecutor did not make a circumstantial evidence argument to the jury is incorrect. The entire opening argument of the prosecutor was based on reviewing the circumstantial evidence. This was a circumstantial evidence argument in a circumstantial evidence case insofar as the manner

in which the killing occurred is concerned. The state admitted not knowing for sure "exactly how this crime was committed" (R-247).

ISSUE IV

This Court is uniquely empowered in the interest of justice in a death penalty case to review all matters in the record. The Court can review this issue and in the interest of justice require a new proceeding to be held. The prejudice is not only that the comment reflected upon the right of the appellant to remain silent at the sentencing proceeding. The comment by the prosecutor also tended to place the burden on the appellant to demonstrate how the homicide occurred in order to merit mitigation. Grounds for mercy, or mitigation from death to life, may arise from the lack of evidence as well as from the evidence. Dixon; Holland. Under Section 775.082 (1), Florida Statutes (1975), the sentence for a capital felony is life unless the special sentence of death is imposed. Only in the most aggravated and unmitigated of capital felonies where the sentence of life imprisonment is not sufficient is the death sentence proper. Accordingly, the burden would rest upon the state under the statute to bear the burden of persuasion. Thus, the comment was very damaging to appellant's right to have the jury not hold any lack of evidence against him. The comment by the prosecutor was damaging to appellant's substantial right to a fair penalty proceeding before the advisory jury, and this Court must vacate the recommendation.

ISSUE V

It is ludicrous for the state to assert that the use of the inflammatory photographs could only be harmless error when the state concedes that the photographs could not be used by the jury in determining whether the homicide was a heinous, atrocious or cruel crime. Since the state did not argue it, and the jury was not instructed upon it, the photographs could only have been used by the jury to consider the credibility of the medical testimony. But the credibility of the evidence was not a matter which this jury was permitted to consider. There were no instructions given to the jury for them to utilize in making an independent determination of the strength of the evidence to prove a premeditated crime. Another jury had convicted appellant. Thus it is inconsistent for the jury to be given inflammatory photographs but no instructions on the alternative proof allowed for conviction. This is the kind of harm for which the judicial power under the present statute to set aside a jury death recommendation is designed to cure.

The failure of the trial court to recognize this, and in allowing the jury to have the inflammatory photographs without any instruction as to how it might be relevant to their consideration, defeats the purpose of the present death penalty procedure as this Court has set forth from State v. Dixon, 283 So.2d 1 (Fla. 1973), onward. Thus on this ground the trial court has prejudicially erred in a manner affecting the substantial right of appellant to an impartial and objective sentencing recommendation by the advisory jury. He is entitled to relief in the form of a new jury proceeding or other appropriate relief

such as a remand for the trial court to impose a sentence in consideration of the original jury's life recommendation or for this Court to reduce the punishment to life imprisonment, or for a new proceeding.

ISSUE VI

Appellant reiterates that appellant's timely demand for discovery had been accepted by the prosecutor as the procedure that would be followed (R-707-708). The appellee does not dispute this assertion. Appellee's argument that harmless error can be determined on the appeal is incorrect. Cumbie v. State, 345 So.2d 1061 (Fla. 1977). Moreover, the statement by the trial judge that it saw no prejudice (R-708-709), does not a Richardson hearing make. The purpose of the Richardson hearing is set out in the decision in Richardson v. State, 246 So.2d 771 (Fla. 1971), to determine lack of prejudice and specific consideration of several factors based upon evidence. This Court took no evidence, and made no determination of fact based upon any stated stipulation of facts offered by the trial counsel. Accordingly, there was no basis for the court to have made the conclusion Richardson requires, thus by definition there was no adequate Richardson hearing. According to the law established in Richardson and Cumbie, this Court must reverse the recommendation returned by the jury at this hearing.

ISSUE VII

It cannot be doubted that the existence of a prior conviction of a felony involving the use or the threat of the use of violence to a person is an important aggravating circumstance. The other two aggravating circumstances were incidents or facets

of the offense itself. Thus the aggravating circumstance of a prior conviction for violent felony was a major factor in the judge's findings that would serve to distinguish the case in any way from the "norm" of capital felonies. Accordingly, evidence erroneously excluded which would have explained the circumstances of the prior conviction and shown that it was not a breaking into a stranger's house would have served to show the jury why less weight should have been attached to that circumstance, if found by the jury to exist.

Accordingly, although this Court may be reminded that the trial court found three aggravating circumstances and found no mitigating circumstances, the error is harmful because the circumstances in such a case can be sufficient to require reduction of a death sentence to life imprisonment. See Neary v. State, 384 So.2d 881 (Fla. 1980), reducing a death sentence to life imprisonment despite the finding by the trial court of aggravating circumstances and no mitigating circumstances when the defendant showed a basis in evidence for a sentence of life imprisonment to be reasonably recommended and imposed.

ISSUE VIII

Appellee has argued that this Court has "already decided the issue against appellant's contentions" (Appellee's brief, p.21). However, this Court on the original appeal ruled that the judgment of conviction should be affirmed. Due to the error in the trial court's use of the jury deadlock charge, after the jury had reported a firm six to six tie with no jurors willing to change their vote absent additional instructions, the cause was remanded but the death penalty issues were not decided.

As early as Rabon v. State, 7 Fla. 2, 13 (1857), this Court insisted that procedural statutes concerning capital proceedings be construed in a manner not "shocking to the feelings of humanity." In Menendez v. State, 419 So.2d 312 (Fla. 1982), at 314, where there had been no error with regard to evidence or instructions there was no reason for a new jury to be impaneled.

As in Lee v. State, 340 So.2d 474 (1976) the question of whether a person should be put to death should not be determined by legal technicalities which do not take into account the factors of substantial justice and equality. Based upon this Court's decision in Wilson v. State, 225 So.2d 321 (Fla. 1969), the present statute which gives the jury standards to guide them in making the determination of whether to recommend life imprisonment is equivalent to "defining murder in the first degree" based upon "other prescribed elements necessary to be proven from the evidence to merit the supreme penalty." Id. at 325.

The jury finding for the appellant at the first advisory penalty proceeding, where the six to six tie was reported in writing, is sufficient to constitute a life recommendation. It is the action of the jury that constitutes the jury verdict, not its acceptance by the court, as this Court held in Potter v. State, 109 So. 91, at 93 (Fla. 1926):

> The rule is general in this country that a verdict of acquittal, although not followed by a judgment, is a bar to a subsequent prosecution of the same offense. (Quoting Ball v. United States, 163 U.S. 662, 671 (1896).)

The value of a jury recommendation, especially a life recommendation, was expressed in Lamadline v. State, 303 So.2d 17 (Fla. 1974), at 20:

> Both the trial judge, before imposing a sentence, and this Court, when reviewing the propriety of the death sentence, consider as a factor the advisory opinion of the sentencing jury. In some cases it could be a critical factor in determining whether or not the death penalty should be imposed.

Appellee says on page 23 of its brief that the failure to raise this issue below waives the right to present it on appeal. However, this issue was raised below. The appellant moved in the trial court for the court to accept the original jury vote as a recommendation of life imprisonment. Appellant also argued that the double jeopardy clause precluded retrial of the penalty before another advisory jury under these circumstances. (R-909-910, 938). The second advisory recommendation under these circumstances was an erroneous procedure.

ISSUE IX

Appellee argues here that Dr. Wright had not seen the photographs for many years. This argument would be appropriate concerning the weight to be given the testimony from Dr. Wright, but would not be a basis to exclude his testimony.

ISSUE X

The trial court's refusal to appoint the same counsel who had represented the appellant on the appeal, as appellant requested the trial court to do, on the basis that the trial court was not convinced that counsel was qualified is erroneous for several reasons. First, this remand was a portion of the

appellate proceedings as was the remand hearing ordered in Messer v. State, 384 So.2d 644 (Fla. 1980). The trial court's refusal to recognize a member of the Florida Bar as qualified to practice in his court is inconsistent with the power and duty of this Court to regulate those who practice law.

The record shows that the counsel who was appointed by the trial court stated that he was unprepared to adequately represent the appellant at the sentencing hearing, requested a continuance, had never participated in an advisory penalty proceeding, stated specifically that particular witnesses and evidence could be presented, but counsel had been unable to be prepared to present such evidence in the time allowed (R-50-54, 825). Unquestionably, the refusal of the trial court to appoint experienced counsel, as the court said it would do, prejudiced the appellant in the advisory proceeding.

ISSUE XI

A presentence report is discretionary in a capital case and is not generally required. But the fact that the failure of a trial court to order a pre-sentence report in other cases was not reversible error does not control this case. Appellant was incarcerated for the past six years of his life prior to the second jury advisory proceeding. The use of a pre-sentence report would have aided the appellant in showing the trial court that appellant had a potential for rehabilitation. The absence of the pre-sentence report deprived the court of that information.

In a case such as this one where one jury was unable to reach a verdict on the guilt or innocence of the appellant, and where a second jury was unable to reach a majority decision for

death without the erroneous use of the jury deadlock charge, and where the third jury proceeding was tried as this one was without any instructions on the definition of the offenses, the actual sentencing decision should not have been made without the consideration of all available information. This Court has noted that the sentencing decision in a capital case should consist of a careful analysis of the background and character of the offender. This is exactly what appellant requested the pre-sentence report for the purpose of showing, and the denial of same under these circumstances of appellant's continued insolvency should be considered an abuse of discretion and warrant the reversal of this death sentence.

ISSUE XII

The appellant recognizes that the prosecutor's closing argument was not the subject of objections by appellant's counsel. However, it is well-established that arguments of counsel can constitute prejudicial and reversible error in the absence of objection when those comments are so pervasive and inflammatory to a dispassionate consideration of the case such that neither rebuke nor retraction would have entirely destroyed the sinister influence of the remarks. See cases in initial brief.

Appellee's contention that the prosecutor's argument could not possibly have prejudiced appellant is erroneous. The comment that he agreed with the jury verdict is also an improper and damaging remark. The combination of these remarks could well have influenced the jury to reach a more severe sentencing

recommendation than it otherwise would have, and under Blair v. State, 406 So.2d 1103 (Fla. 1981), the penalty determination must be reversed.

ISSUE XIII

As this Court held in Valle v. State, 394 So.2d 1004 (Fla. 1981) adequate time and actual preparation for trial are essential to a fair proceeding and to the effective assistance of counsel guaranteed under both the Florida and federal constitutions.

The summary denial of the continuance, despite the adequate and specific grounds stated by counsel for appellant, was an abandonment of the trial court's discretion and indeed an abuse of it. In this case, consisting of an extensive record showing that counsel had not previously been involved with the case, who made good faith assertions supported by specific factual representations that evidence was still being gathered that would give significant support to the defendant's claim for a sentence less than death, the motion should have been granted.

This Court should not affirm the death sentence when the jury advisory proceeding was held in eleven weeks after counsel requested a reasonable continuance for an additional week to locate photographs which Dr. Wright had previously reviewed (appellee notes in its argument under Point IX that these photos had not recently been reviewed by the pathologist), and where additional witnesses would have been available to shed significant light on the circumstances of the offense. Petitioner was entitled to try to show that the homicide in this case was not the brutal beating that might otherwise be inferred. Due

solely to the lack of this evidence, the offenses appeared more aggravated than the evidence would have shown if appellant had been afforded adequate time for his counsel's preparation for the sentencing proceeding. Appellant is as entitled to a fair proceeding on the issue of penalty as he is on the issue of guilt or innocence. Singer v. State, 109 So.2d 7 (Fla. 1959).

ISSUE XIV

The jury instruction which directly advised the jury that the evidence proved that the crime was committed under sentence of imprisonment is not contained in the standard jury instructions. Although the first sentence of the trial court's instruction was taken from the Florida Standard Jury Instructions in Criminal Cases, page 78 of the 1981 edition, the second sentence is neither a correct jury instruction nor is it taken from the standard instructions provided by this Court.

The jury's evaluation of the weight to be given to any evidence supporting an aggravating circumstance is within the advisory jury's discretion. See State v. Dixon, supra at 10, discussing the fact that under each of the circumstances the sentencing jury and the trial judge are permitted to consider the total evidence and circumstances in determining the weight to be given either aggravating or mitigating circumstances. The power of this Court to review the case and determine whether or not the punishment is too great, id., presupposes that an original advising jury and sentencing judge are to weigh the facts presented. The instruction to this jury that the parole status of the appellant is equivalent to being under sentence of imprisonment is inconsistent with the jury role to weigh and

determine whether the circumstances warranted full application of that circumstance to the penalty recommendation they were asked to make.

The use of this additional aggravating circumstance on remand, based upon the subsequent decision in Aldridge v. State, 351 So.2d 942 (Fla. 1977), raises an issue now pending before the United States Supreme Court in Arizona v. Rumsey, cert. granted January 9, 1984, reported at 34 Criminal Law Reporter 4141. Appellant preserved the double jeopardy issue in the trial court by moving on jeopardy grounds to have the aggravations limited to those found in the first sentence. The finding that appellant was under a sentence of imprisonment should be disregarded. This Court should remand for a sentence of life imprisonment or with instructions that either a new sentencing hearing be held or that a new sentence be imposed based upon the original jury's determination by a tie vote that a sentence of life imprisonment should be imposed.

ISSUE XV

In Cooper v. State, 336 So.2d 1133 (Fla. 1976), this Court stated that the trial court's view of those circumstances which it believed were applicable should not color what the jury is permitted to consider at the sentencing proceeding in a capital case under Florida's present statute. This is exactly what the trial court did in instructing the jury on only three of the circumstances which could exist in this case and then instructing the jury in effect that the facts supported each of those circumstances. This is far from the fair and independent jury advisory proceeding that this Court envisioned in State v. Dixon,

supra, and elaborated upon in Cooper v. State, supra. The instructions left precious little room for the jury to exercise its independent determination of whether the evidence was sufficient in their own view to support these aggravating circumstances and ultimately whether a sentence of death should be recommended.

CONCLUSION

Wherefore, appellant prays this Court will find that he is entitled to relief based upon the issues and grounds set forth on this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to JOY SHEARER, Assistant Attorney General, Room 204, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401, this 30th day of January, 1984.