IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,307

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HARRY DEAN HUDDLESTON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

* *

BRIEF OF APPELLEE

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INTRODUCTION

The Appellant, Harry Dean Huddleston, seeks review and reversal of the June 29, 1983, judgment and the July 7, 1983 sentence of the Honorable Arthur I. Snyder, Circuit Court Judge of the Eleventh Judicial Circuit in and for Dade County, Florida.

The Appellant, Harry Dean Huddleston, was the defendant below and will be referred to as the Appellant, the Defendant, or by name.

The Appellee, the State of Florida, was the prosecution below and will be referred to as the Appellee or the State.

References to the record on appeal will be designated by the letter "R". References to the transcript of proceedings will be designated by the letter "T".

STATEMENT OF THE CASE AND FACTS

On March 2, 1983, a Dade County grand jury returned a two count indictment charging the Appellant, Harry Dean Huddleston, with first degree murder and armed robbery, in violation of §§782.04 and 812.13, Fla.Stat., respectively. (R.1-2a). The Public Defender's Office was subsequently appointed to represent the Appellant at trial.

Trial commenced on June 27, 1983. On the morning of trial, the Appellant filed a motion to strike the petit venire and requested an evidentiary hearing on the motion. (R.29, 139). In his motion, the Appellant argued that the jury selection method required by Chapter 40, Florida Statutes, resulted in venires which underrepresented latins and therefore caused a violation of the Appellant's right to trial by jury and due process of law as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. (R.29-30).

After the trial court denied the motion, (R.139), trial began. On June 29, 1983, the jury returned a verdict of guilty on both first degree murder and armed robbery. (R.109-110). The Appellant was adjudicated guilty on both charges at that time. (R.13).

On June 30, 1983, the trial court conducted a separate sentencing proceeding on the first count of the indictment pursuant to §921.141, Fla.Stat. At its conclusion, the jury rendered an advisory sentence of life imprisonment without the possibility of parole for twenty-five years. (R.118). The trial court set sentencing for July 7, 1983. (R.17).

On that date, the trial court disagreed with the jury's recommendation and sentenced the Appellant to death. (R.124). In reviewing the evidence, the trial court found

the following aggravated factors had been established:

> 1. That the Defendant had been previously convicted of a felony involving the use of or threat of violence to the person.
>
> 2. That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effectuating an escape from custody.
>
> 3. That the capital felony was especially heinous, atrocious or cruel.
>
> 4. That the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Although the trial court found that the Appellant had no significant history of prior criminal activity, it ruled that the aggravating circumstances far outweighed the mitigating circumstances and mandated imposition of the death penalty. (R.119-124).

Notice of Appeal was filed on September 22, 1983. (R.130).

I

THE GUILT PHASE

In the early morning hours of February 5, 1983, Dawn Perkins died as a result of blunt force trauma, strangulation, and stab wounds inflicted by the Appellant, Harry Dean Huddleston, at the Non-Commissioned Officer's Club on Homestead Air Force Base, Dade County, Florida. The State submitted the actions of the Appellant evinced a premeditated intention to kill the victim and, of course, a plan to rob the NCO Club. The defense, however, argued that the crime committed was second-degree murder. (R.780).

The evidence produced at trial revealed that in January of 1982, the Appellant had been hired as a civilian employee at the NCO Club on the Homestead Air Force Base. The Appellant worked as a bar back[1] at the club until he was fired approximately three weeks prior to the February 5, 1983, murder. (R.437, 491, 609).

The victim, Dawn Perkins, was employed at the NCO Club as a weekend general cashier. Employed for approximately one year, her duties included tallying the previous day's receipts, counting the money, making deposit records, and

[1]A bar back ws described as an individual who stocked the bars, cleaned, and set up for the bartenders. (R.93).

traveling to the bank. Her weekend hours were flexible, but she usually arrived at the NCO Club early to perform her duties. (R.595-597).

At approximately 10:30 p.m., February 4, 1983, the Appellant entered Homestead Air Force Base through the west gate. (R.693). When the Appellant arrived at the NCO Club, he observed the bar manager's vehicle outside. Because the Appellant did not want to see the manager, he left the base. (R.693).[2]

The Appellant returned through the west gate of the base at approximately 12:00 a.m., midnignt. (R.469, 693). When the Appellant arrived at the NCO Club, he entered and requested his check from the assistant night manager, Manuel Powell. (R.438). Because the bar was busy, Powell stated that he would give the Appellant his money later. (R.438). The Appellant remained in the NCO Club, played Donkey Kong, and talked to another individual until 2:30 a.m., closing time. (R.693-694).

The Appellant then went into the office of the assistant night manager and was given his paycheck. The Appellant stated that he was going to wait around for one of

[2]The alleged purpose of the visit was to obtain his last paycheck. (R.693).

the other employees who was still working. The assistant night manager stated, "No problem. I'll see you later," and the Appellant returned to the gameroom area of the club. (R.443-444). Powell, the Appellant, and others left the bar on February 5, 1983, at 3:00 a.m. Powell testified he last saw the Appellant walking toward his bicycle. (R.447). Instead of leaving, however, the Appellant went behind the club and entered a utility shed that was being built. (R.102, 694).[3]

Bradley Jansen, a security policeman, and his partner, arrived at the NCO Club on routine patrol at approximately 4:00 a.m. (R.475). While checking the utility shed, Jansen discovered the Appellant sitting in a corner of the shed sleeping. (R.481). After the Appellant said he was sleeping there because he had nowhere else to go, the Appellant was taken to the patrol office with his bicycle. (R.481).

The Appellant arrived at the patrol office shortly after 4:00 a.m. William McCormick, police chief, security interviewed the Appellant. (R.488, 491). The Appellant told McCormick that he had been on the base to pick up his paycheck. After confirming the Appellant's story with the

[3]The Appellant had stated he had nowhere else to go. (R.102, 694).

night manager of the club and learning that the Appellant had been fired, McCormick repossessed the Appellant's identification card. (R.491-492). After the interview, the Appellant was escorted to the north gate of the base and left the military installation. The time was between 5:00 a.m. and 5:30 a.m. (R.482-484).

The Appellant rode his bicycle around for a while, parked his bike near a lake, jumped a perimeter fence near the northwest part of the base, and headed back toward the NCO Club. (R.102, 705-706). As the Appellant approached the club, he observed the victim's silver moped parked outside. (R.96, 706).

The Appellant went to the front door of the NCO Club and knocked. The victim answered the door, said hello, and let the Appellant enter.[4] After the Appellant came in, the victim returned to the cashier's cage and continued her work. After pretending to be doing his job for approximately ten minutes, the Appellant entered the ladies bathroom and called for the victim because the bathroom was allegedy flooding. (R.96, 708-709).[5]

[4]There was no evidence indicating that the victim was aware that the Appellant no longer was employed at the club. (R.708).

[5]There was no evidence of flooding. (R.485).

As soon as the victim entered the bathroom, the Appellant, a karate expert, immediately attacked. (R.709). The Appellant struck the victim four or five times with his elbows, knocking her to the floor. The victim began screaming and struggling. She stated that she knew what the Appellant wanted, referring to the money. (R.97, 709). While the victim was on the floor, the Appellant picked up a chair and struck the victim on the head. (R.61, 97, 710). The Appellant then began to strangle the victim and did so for approximately one minute. (R.710).

When the Appellant noticed the victim was still moving and conscious, he left the bathroom, went across the hall to the bar, and brought back a six inch, serrated-edged steak knife. The Appellant stabbed the victim repeatedly in the chest, neck, and back. During this stabbing, the victim asked, "Why are you stabbing me? I'm already dead." The Appellant only stopped when the blade of the knife bent. (R.98, 711, 891).

When the Appellant observed some movement left in the victim's body, he again left the bathroom area and obtained a sixteen inch long butcher knife from the kitchen. After returning to the bathroom, the Appellant began stabbing the victim again. (R.98, 711).

Dr. Valarie Rao, a Dade County Medical Examiner,

testified that the cause of death was a combination of blunt force trauma, sharp force trauma and strangulation. (R.642). The blunt force trauma was demonstrated by various lacerations and abrasions on the head and upper body of the victim. The victim's eyes had been blackened, her face swollen, and a rib broken. Blunt trauma injuries were located on Appellant's chin, shoulders, neck, ears, and scalp. Some of the blunt force trauma injuries on the arms of the victim were defensive-type wounds. (R.623-631).

Dr. Rao also found evidence of manual strangulation on the victim. (R.630-631).

In addition, Dr. Rao discovered that the victim had been stabbed a total of 29 times in the upper body. (R.638). Five of the stab wounds were located in the neck, eighteen in the upper middle back, and the remainder in the chest and ear. (R.631-635). The doctor also detected a number of defensive wounds on the hands and arms of the victim. (R.638-640).

After the victim had died, the Appellant went to the cashier's cage, opened the door, and put approximately $13,000 in a plastic garbage bag. (R.99, 597-599). The Appellant then left by a side door to the NCO Club with the money, the keys to the building, and the butcher knife. (R.99).

The Appellant returned to his bicycle near the lake. After tossing the knife and the keys into the lake, the Appellant rode home. (R.99). At approximately 7:10 a.m., the bar manager, James Westbrooks, arrived at the NCO Club for work. When he entered the building, he noticed that the cashier's door was open and that the safe was open. Upon investigation, Westbrooks discovered the victim lying on the floor of the ladies bathroom. (R.453-456). Westbrooks immediately left the bathroom and telephoned the police. (R.463-465).

Minutes later, security arrived. They tested for a pulse on the woman, but found none. (R.493-496).

Shortly after 8:00 a.m., Metro-Dade Police Officer Carl Baske arrived at the NCO Club. Baske was given the name of the Appellant as an individual who may have been a possible witness. (R.503). When the officer arrived at the Appellant's address, he met the Appellant and informed him that a homicide had occurred at the base. The Appellant voluntarily agreed to return to the base and talk to detectives. (R.508).

When the Appellant arrived at the base, Metro-Dade Detective Rafael Nazario conducted an interview. Nazario advised the Appellant that he was a suspect and read him his Miranda rights. After the Appellant agreed to the

interview, he detailed the previous night's events from his arrival at the club through his being escorted out at 4:00 a.m. (R.692-694). The detective noticed scratches on the Appellant's arms and fingers, which were explained as being caused by a pet. A bruise discovered on the Appellant's left hip was explained as being caused by his cutting of a tree by his residence.

(R.701). When the Appellant was unable to explain blood seen by the detective on the Appellant's jacket, the detective asked the Appellant if he had killed the victim. The Appellant said, "Yes sir." (R.704). The Appellant admitted planning the robbery one or two days in advance, gave a detailed description of the events surrounding the victim's death, and stated he killed the victim because she would know who he was. (R.704-713). The Appellant took the detective to his residence to retrieve the money and also surrendered the clothing that the Appellant had been wearing. (R.714-718). The Appellant later traced for police the path he had taken to leave the NCO Club and showed them where he had thrown the butcher knife and keys. (R.721).

At approximately 3:35 p.m. on that same day, Appellant gave a formal statement to the police. (R.93-105).

II

PENALTY PHASE

During the Penalty Phase of the Appellant's trial, the State introduced into evidence a certified copy of the Appellant's conviction for first degree murder and armed robbery with a deadly weapon. (R.865). The State also elicited testimony with regard to the pain and suffering of the victim during her murder through medical examiner Rao.

Dr. Rao began by again describing the defensive wounds suffered by the victim. (R.873-875). The doctor also testified that the amount of blood in the chest cavity of the victim revealed that the victim was still alive when she suffered the butcher knife stab wounds. (R.884-887). Tracing the various injuries suffered by the victim, Dr. Rao stated the victim suffered "a lot of pain" by the blows to the head, "a lot of pain" from the strangulation, "tremendous pain" from the knife wounds, and "tremendous pain" from the slicing wounds in the neck area. (R.889-894). The doctor also concluded that the knife wounds puncturing the pleura caused additional pain above and beyond the other stab wounds. (R.896).

After the State adopted a testimony presented during the trial phase and rested, the Appellant took the stand. The Appellant described his family history, (R.912-917), his experience with narcotics, (R.918-920), and his remorse for the killing. (R.920-922).[6]

[6]On cross-examination, the Appellant again described the murder, including a demonstration of how he struck the victim's head. (R.930-973, 951).

POINTS ON APPEAL

I

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO DEATH WERE THE COURT PROPERLY FOUND FOUR AGGRAVATING FACTORS, CONSIDERED ALL EVIDENCE PRESENTED IN MITIGATION, AND DETERMINED THAT THE AGGRAVATING FACTORS OVERWHELMINGLY OUTWEIGHED THE ONLY MITIGATING FACTOR OF APPELLANT'S LACK OF CRIMINAL HISTORY.

II

WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO STRIKE PETIT JURY VENIRE, OR, ALTERNATIVELY, TO AFFORD THE DEFENDANT AN OPPORTUNITY TO PRESENT EVIDENCE TO SUBSTANTIATE HIS CONSTITUTIONAL CLAIM THAT THE JURY SELECTION PROCESS OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA DOES NOT COMPORT WITH DUE PROCESS AND EQUAL PROTECTION OF LAW WHERE THE PLEADING FAILED TO ALLEGE CIRCUMSTANCES NECESSARY TO CONDUCT AN INQUIRY.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN SENTENCING THE APPELLANT TO DEATH WERE THE COURT PROPERLY FOUND FOUR AGGRAVATING FACTORS, CONSIDERED ALL EVIDENCE PRESENTED IN MITIGATION, AND DETERMINED THAT THE AGGRAVATING FACTORS OVERWHELMINGLY OUTWEIGHED THE ONLY MITIGATING FACTOR OF APPELLANT'S LACK OF CRIMINAL HISTORY.

The Appellant argues that the trial court committed numerous errors during the sentencing phase of the Appellant's trial which mandate reduction of his sentence to life imprisonment. In particular, the Appellant suggests that the trial court improperly concluded that the homicide in the present case was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The Appellant next suggests that the trial court failed to consider non-statutory mitigating factors during the penalty phase. Finally, the Appellant states that the trial court utilized an improper legal standard to override the jury's recomendation of life imprisonment. A review of each of these arguments reveals they are not supported by the record of this case and, as a result, the conviction and sentence should be upheld.

A. Proof of Section 921.141(5)(i), Fla. Stat.

Section 921.141(5)(i), Fla.Stat., provides as follows:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The legislature's addition of paragraph (i) to Section 921.141(5), Fla.Stat., only reiterates in part what is already an element of premeditated murder. Paragraph (i) adds nothing to the elements of the crimes charged but rather adds the limitation that the premeditation have been "cold, calculated and...without any pretense of moral or legal justification." Herring v. State, ___So.2d___, Case No. 61,994 (Fla. February 2, 1984)[9 FLW 49].

This court has often stated that the aggravating circumstance of Section 921.141(5)(i), Fla.Stat., should not be utilized in every premeditated murder prosecution. Although not intended to be all inconclusive, McCray v. State, 416 So.2d 804 (Fla. 1981); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982), it has been recognized that the factor traditionally applies to those murders which are characterized as execution, contract, or witness elimination murders. Herring v. State, supra. The evidence adduced at trial clearly supports the trial court's application of this factor.

Two days prior to the murder and robbery, the Appellant planned the crime. He informed Detective Nazario that he knew the victim would be present and that she would be alone. (R.706). Upon gaining entry into the NCO Club, the Appellant tricked the victim into entering the ladies room to observe an alleged flood. (R.96).

When the Appellant began his attack on the victim, the victim stated that she knew why he was there and that he wanted the money. Rather than simply rob the club, the appellant continued his attack by striking the woman with various blows to the head and upper body, as well as striking her over the head with a chair. When he found that strangulation was insufficient, he went to another room and obtained a steak knife. During the course of her stabbing, the victim asked why he was doing so since she was "already dead." Even after such statements, the Appellant stopped only to get a larger knife when the shorter one bent. (R.709-711).

The victim in the present case had been pleasant and nice to the Appellant during the course of his employment at the NCO Club. She had never antagonized him nor given the Appellant any reason to dislike her. (R.965). As in Middleton v. State, 426 So.2d 548 (Fla. 1982), the

shocking thing about the victim's murder is that the only thing the victim ever did to the Appellant, so far as the record indicates, was show him extraordinary kindness and generosity. Middleton v. State, supra, 426 So.2d at 553. The victim's reward was a coldly calculated termination of her life.

Citing Jent v. State, 408 So.2d 1024 (Fla. 1981), the Appellant suggests that the State's evidence was insufficient to show the cold, calculated premeditation necessary to support Section 921.141(5)(i), Fla.Stat. The Appellant states that his discovery during the early morning hours sleeping in the back shed area of the NCO Club, his explanation that he had nowhere else to go, and his subsequent statement that he did not plan to hurt the victim until he was inside the club negate premeditation. These self-serving statements, however, are belied by the Appellant's previous admission that he had planned the robbery two days prior to the murder and that he knew the victim would be present. The fact that his pre-murder statements are untruthful is best demonstrated by evidence that the Appellant had a residence a short distance from the NCO Club. (R.947).

The present case is similar to Herring v. State, ___ So.2d___, Case No. 61,994 (Fla. Feb. 2, 1984)[9 FLW 49].

In Herring, a convenience store clerk was presented with a holdup note from the defendant. When the clerk made a sudden movement, the appellant shot the clerk once in the head and once again after the clerk hit the floor. Affirming the appellant's conviction, this court found the proof sufficient to establish Section 921.141(5)(i), Fla.Stat.:

> Appellant's fourth point was that the trial judge improperly found the aggravating circumstance that this murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. We have previously stated that this aggravating circumstance is not to be utilized in every premeditated murder prosecution. Rather, this aggravating circumstance applies in those murders which are characterized as execution or contract murders or witness/elimination murders. We have also held, however, that this description is not intended to be all inclusive. [Citations omitted]. In the instant case, the evidence does reflect that appellant shot the store clerk in response to what appellant believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor. The facts of this case are sufficient to show the heightened premeditation required for the application of this aggravating circumstance as it has been defined...
>
> Henning v. State, supra, at 9 FLW at 51.

See, also, Middleton v. State, 426 So.2d 548 (Fla. 1982);

Hill v. State, 422 So.2d 816 (Fla. 1982); Combs v. State, 403 So.2d 418 (Fla. 1981).

The evidence in the present case clearly was sufficient for the trial court to conclude that the Appellant planned the robbery in advance, knew the victim would be present, and decided that she would have to be killed because of her ability to identify him. Under such circumstances, the State would suggest that the "heightened premeditation" necessary to support Section 921.141(5)(i), Fla.Stat., was shown.

Assuming arguendo, that the trial court erred in finding paragraph (i) applicable, the death sentence should nonetheless be affirmed. When one or more of the aggravating circumstances are found, death is presumed to be the proper sentence unless it is overridden by one or more of the mitigating circumstances. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Although one improper aggravating factor may have been included in the weighing process, "we can know" that the result of the weighing process would not have been different had the one impermissible factor not been considered. Bassett v. State, ___So.2d___, Case No. 58,803 (Fla. March 8, 1984)[9 FLW 90]. As in Brown v. State, 381 So.2d 690 (Fla. 1980), cert. denied, 449 U.S. 1118 (1981), and Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert.

denied, 444 U.S. 919 (1979), there are ample other statutory aggravating circumstances to support the weighing process in this case.

B. The Consideration of Non-Statutory Mitigating Factors

The Appellant next argues that the trial court failed to consider the non-statutory mitigating factors of employment background, remorse and willingness to accept responsibility, cooperation with law enforcement, history of drug abuse, and his family situation. A review of the record refutes the Appellant's assertions.

It is within the province of the trial court to decide whether a particular mitigating circumstance in sentencing has been proven and the weight to be given it. Daugherty v. State, 419 So.2d 1067 (Fla. 1982); Riley v. State, 413 So.2d 1173 (Fla. 1982); Smith v. State, 407 So.2d 894 (Fla. 1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979). In the present case, the trial court found the only mitigating circumstance was the Appellant's lack of previous criminal history. Although the Appellant may have presented evidence of non-statutory mitigating circumstances, the trial court clearly concluded that such proof was insufficient. As such, the trial court acted within its province and his findings should not be attacked on appeal.

The suggestion that the trial court did not consider such evidence is erroneous. The trial court explicitly stated that it was considering the evidence introduced at trial and at the penalty phase in determining the sentence to be imposed. (R.124). Furthermore, there is no indication from the record that the trial court limited its consideration of mitigating factors to only those which are statutorily enumerated. The mere fact that the trial court failed to find the mitigating factors urged by the Appellant does not mean that the trial court did not consider the evidence. Riley v. State, supra, 413 So.2d at 1175.

Some additional points need to be made, however, with regard to the particular non-statutory mitigating factors argued by the Appellant. The suggestion that the Defendant had an exemplary employment record is not supported by the trial transcript. The sole testimony relating to the Appellant's employment is that he held a job in Oklahoma for two and a half years, worked at an NCO Club at Pope Air Force Base for an undisclosed period, and accepted a job at the club on Homestead Air Force Base. Unlike McCampbell v. State, 421 So.2d 1072 (Fla. 1982), no evidence was presented to support the conclusion that the Appellant's employment was "exemplary." Such a conclusion would be suspect in light of the Appellant's firing at the Homestead NCO Club immediately prior to this incident. (R.491-492).

The trial court properly rejected the Appellant's assertion that his remorse, acceptance of responsibility, and assistance of law enforcement officials constituted mitigating circumstances. It should be remembered that the Appellant did not surrender himself after perpetration of this heinous crime, but instead returned to his residence. Although the Appellant was immediately advised that he was a suspect when confronted by law enforcement officials, he did not initially admit guilt. It was only after the Appellant was unable to explain the presence of blood on his jacket that he admitted the murder. (R.692-694; 701-704). After learning he was under investigation, the Appellant cooperated with police, accepted responsibility, and expressed remorse.

It is for precisely these reasons that Washington v. State, 362 So.2d 658 (Fla. 1975), controls. In Washington, the appellant made an argument similar to the one presented to this court. Washington suggested that the trial court erred in failing to consider in mitigation the fact that he had voluntarily surrendered to authorities and confessed. This court rejected such an argument because the record demonstrated that the appellant did not surrender until he was aware that his accomplices had been apprehended and that he was also sought by the police. Washington v. State, supra, 362 So.2d at 667. Once again, the argument should

fail before this court. The record clearly establishes that it was only after the investigation had focused on the Appellant that he decided to cooperate and confess. Under such circumstances, the trial court had substantial basis for declining to find these factors in mitigation.

The Appellant's final suggestion that his family situation and drug history required a finding of mitigation must also fail. Although the Appellant stated that he had a history of drug use and had consumed both marijuana and LSD the evening prior to the homicide, (R.917), he also testified that the use of narcotics had no effect on his actions when he killed the victim. (R.972-975). Indeed, the Appellant did not argue that the use somehow diminished his capacity or created an impairment of his ability to understand his actions. Whether an "excuse," justification, or "explanation," the trial court properly found it not to be a mitigating circumstance. With regard to the Appellant's personal and family situation, it should be noted that the Appellant never argued it in mitigation during the penalty phase. The trial court heard the testimony and concluded it had insufficient weight to constitute a mitigating circumstance. By doing so, the trial court acted within its province.

C. Utilization of Proper Standard to Override the Jury Recommendation

The Appellant concludes the attack on his sentence by arguing that the trial court failed to utilize the proper legal standard in overriding the jury's recommendation of life imprisonment. In doing so, the Appellant isolates one sentence in the trial court's order to suggest that the trial court simply "disagreed" with the life recommendation and sentenced the Appellant to death. A review of the record reveals that the trial court properly performed its function and appropriately sentenced the Appellant to death.

Section 921.141(3), Fla.Stat., provides:

> Notwithstanding the recommendation of majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death...

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. Tedder v. State, 322 So.2d 908 (Fla. 1975). Implicit in overruling a jury's recommendation is the fact that the trial court "disagreed" with their verdict. The mere fact that such a statement was made

does not indicate failure to accord the jury recommendation its proper weight.[7]

It is the function and province of the trial court to determine the weight to be given particular mitigating circumstances and whether they offset the established aggravating circumstances. Herring v. State, supra, 9 FLW at 52. This court must then review the sentence to determine if the facts clearly and convincingly suggest the imposition of death. Tedder v. State, 322 So.2d 908 (Fla. 1975). In the present case, the trial court was correct to overrule the jury recommendation of life imprisonment since there was no reasonable basis for it.

The evidence produced at trial revealed that the robbery and murder had been planned two days in advance. Although the victim had always been cordial and nice to the Appellant, he tricked her into a backroom area and beat her until she was semiconscious. During the initial attack, the victim stated that she knew why he was present and that he wanted the money. This statement indicates that the

[7]The Appellant submits that overriding the jury's recommendation is illogical and argues, absent "special circumstances," a jury override is impossible. Previous jury override cases belie. See e.g., Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied, 454 U.S. 1163 (1982); McCrae v. State, 395 So.2d 1145 (Fla. 1980); White v. State, 403 So.2d 331 (Fla. 1981); Johnson v. State, 393 So.2d 1069 (1980); Hoy v. State, 353 So.2d 826 (Fla. 1977); Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978).

Appellant could have simply obtained her cooperation in the taking of the money. Nonetheless, the Appellant crashed a chair over the victim's head and strangled her. Although the victim was barely conscious, the Appellant stabbed the victim until the knife bent. The victim's statement asking why the Appellant was stabbing her since she was already dead indicates the horror of the Appellant's acts. Still not satisfied, the Appellant retrieved yet another larger knife to finish his task.

The present case is not unlike Hoy v. State, 353 So.2d 856 (Fla. 1977). After a jury recommendation of life imprisonment, the trial court found aggravating factors similar to those in the present case. Noting that the murder was committed while Hoy was engaged in a commission of a violent felony, perpetrated for the purpose of avoiding witness against him, and committed in a heinous, atrocious, and cruel manner, the trial court found that mitigating circumstances of Hoy's age and lack of significant history of prior criminal activity were insufficient to outweigh the aggravating circumstances. This court affirmed that conviction.

The cases cited by the Appellant are distinguished. In McKennon v. State, 403 So.2d 389 (Fla. 1981), the jury

override was reversed on appeal. Since the trial court found only one aggravating factor and one mitigating circumstance, this court ruled that a rational basis existed for the jury's recommendation. In McCampbell v. State, 421 So.2d 1072 (Fla. 1982), the sentencing order overriding the jury's recommendation of life imprisonment was riddled with error. The trial court improperly considered a non-statutory aggravating factor, improperly found the existence of other aggravating factors, and did not acknowledge the jury's reasonable reliance on certain mitigating circumstances. A similar problem existed in Herzog v. State, 439 So.2d 372 (Fla. 1983).

Such problems do not exist in the present case. Other than paragraph (i), the Appellant admits that each of the aggravating factors found by the trial court existed. Although arguing that the trial court failed to consider certain non-statutory mitigating, the record belies such a position. See, supra. The Appellant points largely to his self-serving remorse expressed after learning he was a suspect to support the jury's actions. The trial court was correct in rejecting such testimony as mitigation. See, Washington v. State, supra.

The appropriate nature of the death penalty in this case is readily apparent when compared with other decisions

of this court. Herring v. State, ___So.2d___, Case No. 61,994 (Fla. February 2, 1983)[9 FLW 49]; Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979); Hoy v. State, 353 So.2d 826 (Fla. 1977); Meeks v. State, 339 So.2d 186 (Fla. 1976), cert. denied, 439 U.S. 991 (1978).

Although the jury's recommendation is to be accorded great weight, the ultimate decision as to whether the death penalty should be imposed rests with the trial judge. White v. State, 403 So.2d 331 (Fla. 1981). In the present case, the totality of the circumstances reveal that the facts at trial suggested death in such a clear and convincing manner that virtually no reasonable juror could have differed. Tedder v. State, supra.

II

THE TRIAL COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO STRIKE PETIT JURY VENIRE, OR, ALTERNATIVELY, TO AFFORD THE DEFENDANT AN OPPORTUNITY TO PRESENT EVIDENCE TO SUBSTANTIATE HIS CONSTITUTIONAL CLAIM THAT THE JURY SELECTION PROCESS OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA DOES NOT COMPORT WITH DUE PROCESS AND EQUAL PROTECTION OF LAW WHERE THE PLEADING FAILED TO ALLEGE CIRCUMSTANCES NECESSARY TO CONDUCT AN INQUIRY.

The Appellant contends the trial court erred in denying the Appellant's motion to strike the petit jury venire and to conduct an evidentiary hearing. The State submits that an examination of the record and applicable law demonstrates the allegations are without merit.

It should initially be noted that the motion was not submitted for consideration by the trial court until the morning of trial. (R.29, 139). The Appellee submits that the motion was precluded by the time requirements of Florida Rule of Criminal Procedure, 3.190(c). This court has previously noted that defense counsel who wait until just before trial to press such claims will find consideration on appeal precluded. Francois v. State, 407 So.2d 885, 889 (Fla. 1981). The policy requiring a timely and seasonably-made objection is sound and is founded in a consideration of jurisdiction:

> These well settled principles are decisive of the case before us. Disqualifications of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case... The indictment, though avoidable, if the objection is seasonably taken, as it was in this case, is not void... The objection may be waived, if it is not made at all or delayed too long. This is another form of saying that the indictment is a sufficient foundation for the jurisdiction of the court in which it is returned, if jurisdiction otherwise exists. Keizo v. Henry, 211 U.S. 146, 149 (1908) [citations omitted].

Contending that he was denied due process and equal protection, the Appellant's motion suggested that the jury venire had a substantial underrepresentation of latins. (R.31).[8] It is well-established that in order to show a prima facie case of discrimination in the selection of jurors a defendant must demonstrate that the group allegedly discriminated against "is one that is a recognizable, distinct class singled out for different treatment under the laws, as written or applied." Castaneda v. Partida, 430 U.S. 482, 494 (Fla. 1977). A review of the requirements

[8]The Appellant introduced no evidence indicating whether he was latin. Under such circumstances, a question exists whether the Appellant had standing. Beal v. Rose, 532 F.Supp 306, 311 (M.D. Tenn. 1981); Villafare v. Manson, 504 F.Supp 78 (D. Conn. 1980); Barnson v. State, 371 So.2d 680 (Fla. 3d DCA 1979).

makes clear that the Appellant did not carry his initial burden.

In Hernandez v. Texas, 347 U.S. 475 (1954), the Supreme Court listed several factors as contributing to its finding that Mexican-Americans were a cognizable group in Texas. The court found that attitudes in the community separated Mexican-Americans, participation in business and community groups was marginal, Mexican-Americans were required to attend special schools, and separate facilities were maintained for Mexican-Americans in the community. Hernandez v. Texas, supra, 347 U.S. at 479-480. See, also, Foster v. Sparks, 506 F.2d 805, 820 (5th Cir. 1975). The Appellant made no such proffer to demonstrate how the "latins" fit these factors.

In United States v. Rodriguez, 588 F.2d 1003 (5th Cir. 1979), the Fifth Circuit held that where "latins" were composed of persons of such national origins as Cubans, Mexicans, and Puerto Ricans, it could not be said that they possessed such similar interests that they constituted a cognizable group. The State suggests that the Appellant has failed to prove who was composed in the group constituting "latins."

Under Florida law, the Appellant must assert facts

that tend to raise a doubt as to whether a jury panel has been improperly constituted prior to obtaining a full scale investigation. Dykman v. State, 294 So.2d 633, 637 (Fla. 1973); Rojas v. State, 288 So.2d 234, 237 (Fla. 1973). As previously stated, the elements set forth by the United States Supreme Court for equal protection violations require that the defendant establish the group as being a recognizable, distinct class, singled out for different treatment and that the degree of underrepresentation be shown by comparing the proportions of presumptively eligible voters in the population with those called to serve as jurors over a significant period of time, and that the selection process be susceptible to abuse or not racially neutral. Singleton v. Estelle, 492 F.2d 671, 677 (5th Cir. 1979). The use of the characterization, "latin," demonstrates that the Appellant has failed to meet the first criterion.

The Appellee also submits that the Appellant has failed to meet the second criterion by merely giving the probability of latins serving on juries based on voter registration lists, rather than actual figures over the past few years. The proffer of the Appellant also fails in that no showing exists that the proportion of "hispanics" in the total population eligible to serve as jurors is significantly greater than the proportion called to serve as jurors over a significant period of time.

The Appellant's proffer also fails in sustaining the burden of overcoming the presumptive fairness of the source of the petit jurors. Section 40.01, Fla.Stat., states that jurors are required to be registered voters. The constitutionality of this statute has been repeatedly upheld. Bryant v. State, 386 So.2d 237 (Fla. 1980); Johnson v. State, 293 So.2d 71 (Fla. 1974); Reed v. State, 292 So.2d 7 (Fla. 1974); Jones v. State, 289 So.2d 385 (Fla. 1974). Reed v. Wainwright, 587 F.2d 260 (5th Cir. 1979). Any individuals who chose to register would immediately become available for selection in the jury process. As a result, no showing of systematic exclusion can be made.

Federal courts on numerous occasions have concluded that voting by identifiable minority groups in a proportion lower to the rest of the population presents no constitutional issue. See, United States v. Apodaca, 666 F.2d 89 (5th Cir. 1982); United States v. Brummit, 665 F.2d 521 (5th Cir. 1981); United States v. Lopez, 588 F.2d 450 (5th Cir. 1979).

The Appellant finally fails to prove that the alleged underrepresentation results in a systematic exclusion of latins where the Appellant's general population figures do not account for those persons who are aliens, non-citizens, and not eligible for jury service. See,

United States v. Gordon-Nikker, 578 F.2d 972 (5th Cir. 1975); United States v. Musto, 540 F.Supp 346 (D. NJ. 1982).

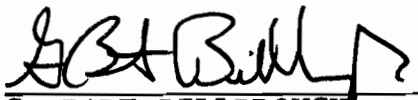
The State has adequate justification for requiring jurors to be registered voters and citizens. States are justified in assuring that those serving on its juries are personally committed to the proper application and enforcement of the law. Perkins v. Smith, 370 F.Supp. 134 (D. MD. 1974), affirmed, 426 U.S. 913 (1976). Additionally, voter registration lists aid in efficiency and the cost of judicial administration. Reed v. Wainwright, 587 F.2d 260 (5th Cir. 1979). For all of the above reasons, the Appellant has utterly failed to establish that the trial court erred in denying his motion to strike the jury venire and motion for evidentiary hearing.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State respectfully submits that the judgment and sentence of the lower court should clearly be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to LAWRENCE BESSER, Samek & Besser, 1925 Brickell Avenue, Suite D-207, Miami, Florida 33129, on this 27th day of March, 1984.

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