IN THE SUPREME COURT OF FLORIDA

CASE NO. 64791

THE STATE OF FLORIDA,

Appellant,

vs.

BEAUFORD WHITE,

Appellee.

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

BRIEF OF APPELLEE

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of
Florida
1351 Northwest 12th Street
Miami, Florida 33125

THOMAS G. MURRAY
Assistant Public Defender

Counsels for Appellee

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STATEMENT OF THE CASE

The appellee accepts the history of the case portion of the statement of the case found in the appellant's brief. The appellee rejects that portion which attempts to recite the facts as being argumentative and inaccurate. A fair and accurate statement of the facts is contained within the appellee's motion for post-conviction relief, found on pages 72-79 of the record on appeal.

POINTS INVOLVED ON APPEAL

I

WHETHER THE STATE IS PRECLUDED FROM APPEALING THE TRIAL COURT'S ORDERS GRANTING POST-CONVICTION RELIEF AND STAYING EXECUTION OF SENTENCE BY THE PROVISIONS OF FLORIDA STATUTES SECTION 924.07, AS WELL AS THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II

WHETHER THE TRIAL COURT CORRECTLY GRANTED THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF.

ARGUMENT

I

THE STATE IS PRECLUDED FROM APPEALING THE TRIAL COURT'S ORDERS GRANTING POST-CONVICTION RELIEF AND STAYING EXECUTION OF SENTENCE BY THE PROVISIONS OF FLORIDA STATUTES SECTION 924.07, AS WELL AS THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The right to appellate review of any order or judgment entered by a trial court is not derived from the common law, it is derived from the sovereign. State v. Smith, 260 So.2d 489 (Fla. 1972). In Florida, the right of the State to appeal is limited to those orders specified in § 924.07, Florida Statutes (1981). Whidden v. State, 159 Fla. 691, 32 So.2d 577 (1947); State v. Brown, 330 So.2d 535 (Fla. 1st DCA 1976); Balikes v. Speleos, 173 So.2d 735 (Fla. 3d DCA 1965), certiorari discharged, 193 So.2d 434 (Fla. 1967). That statute provides:

> 924.07 Appeal by state. - The state may appeal from:
>
> (1) An order dismissing an indictment or information or any count thereof;
>
> (2) An order granting a new trial;
>
> (3) An order arresting judgment;
>
> (4) A ruling on a question of law when the defendant is convicted and appeals from the judgment;
>
> (5) The sentence, on the ground that it is illegal;
>
> (6) A judgment discharging a prisoner on habeas corpus;
>
> (7) An order adjudicating a defendant insane under the Florida Rules of Criminal Procedure; or

> (8) All other pretrial orders, except that it may not take more than one appeal under this subsection in any case.

In their zeal to protect the strictly limited right of the State to appeal, court's have allowed such appeals from orders granting relief under Rule 3.850 Fla.R.Crim.P., if that relief can be analogized to one of those orders specified in the statute. See e.g., State v. Jackson, 414 So.2d 281 (Fla. 4th DCA 1982) (order reducing sentence upon finding of error that arguably effected the fairness of trial); State v. Matera, 378 So.2d 1283 (Fla. 3d DCA 1979), certiorari denied, 386 So.2d 639 (Fla. 1980) (order in effect granting a new trial, of which the defendant did not avail himself, but instead entered a plea of nolo contendere).

In the instant case, there is no such corollary available to the state to permit appellate review. Certainly it cannot be said that the life sentences "imposed"[1] in the trial court are illegal within the meaning of the statute or State v. Jackson, supra. What the State is attempting is to gain appellate review of the factual determination that the defendant did not himself kill anyone, attempt to kill anyone, nor intend that a killing take place. Of course, this finding was made by the original sentencing judge; by this Court in its appellate decision in

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1 Out of concern for the language in State v. Matera, supra, the trial judge has not actually resentenced the defendant. In light of his ruling on the defendant's motion for post-conviction relief, however, the only option available to the trial court is to impose life sentences.

White v. State, 403 So.2d 331 (Fla. 1981), and by the trial judge in granting the defendant's motion for post-conviction relief. The finding was contested by the State for the first time during the hearing on the defendant's motion.[2] Appellate review is simply not available to the State.

This is also true because of the nature of the trial court's ruling. As is well known, a death sentence in Florida is permissible only if the State proves the existence of sufficient aggravating circumstances beyond a reasonable doubt and establishes that there are insufficient mitigating circumstances to outweigh those aggravating circumstances. State v. Dixon, 283 So.2d 1 (Fla. 1973); § 921.141(3), Fla. Stat. (1981). Accordingly, where as here the fact finder makes a finding that a life sentence must be imposed, that fact finder has "acquitted the defendant of whatever was necessary to impose the death sentence," and as such constitutes the functional equivalent of an acquittal. Bullington v. Missouri, 451 U.S. 430, 445-446 (1981).

Under Florida law, the state may neither appeal from nor seek extraordinary-writ review of a judgment of acquittal. Watson v. State, 410 So.2d 207, 208 n.1 (Fla. 1st DCA 1982); State v. Bale, 345 So.2d 862, 863 (Fla. 2d DCA 1977); State v. Brown, supra; Balikes v. Speleos, supra. The only exception to this rule is orders purporting to be acquittals entered without

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2 Any doubt about this assertion can be dispelled by reference to the record on appeal and appellate briefs in White v. State, supra.

jurisdiction. See State v. Harris, 439 So.2d 265 (trial court granted post-verdict judgment of acquittal after a bench trial; Fla.R.Crim.P. 3.380(c) expressly limited to jury trials); State ex rel. Bludworth v. Kapner, 394 So.2d 541 (Fla. 4th DCA 1981) (trial court granted pretrial "acquittal" on insanity). Since the trial court in this case had jurisdiction to determine that the facts of this case barred a death sentence under Enmund, pursuant to Rule 3.850 as interpreted in Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980), its "acquittal" of defendant on the facts necessary to support a death sentence is unreviewable.

That the finding of the trial court is the functional equivalent of an acquittal also serves to bar appellate review under the Double Jeopardy Clause. Bullington v. Missouri, supra, applies the well-established constitutional principle that an acquittal is final and bars retrial. 451 U.S. at 437; accord Tibbs v. Florida, 457 U.S. 31, 102 S.Ct. 2211 (1982); Greene v. Massey, 437 U.S. 19 (1978); Burks v. United States, 437 U.S. 1 (1978); Fong Foo v. United States, 369 U.S. 141 (1962); Potter v. State, 91 Fla. 938, 109 So.2d 19 (1926); C.C. v. Ferguson, 417 So.2d 782 (Fla. 3d DCA 1982); Watson v. State, supra. An acquittal by a trial judge creates the same double jeopardy bar to further proceedings as does a jury verdict of not guilty. Hudson v. Louisiana, 450 U.S. 40 (1981). If a life sentence imposed by a trial judge after finding a death sentence factually and substantively unlawful under the Eighth Amendment is reviewable in this context, it would be equally reviewable when

imposed at the conclusion of a trial. Bullington forbids imposition of a death sentence once an authorized factfinder has determined that death is inappropriate, and that rule accordingly bars review of the substantive propriety of the trial court's determination in this case.

For all of these reasons, appellate review is unavailable to the State in this case.[3]

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3 The appellee will pretermit for now the question of whether, assuming arguendo the state does have the right to an appeal, this court has juridiction to hear it. See Article V, Section 3(b)(1), Florida Constitution.

II

THE TRIAL COURT CORRECTLY GRANTED THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF.

In the event that this Court determines that the State does have a right to appeal, the order of the trial court should nonetheless be affirmed. In responding to the appellant's arguments, reference will be made to the lettering utilized in the Brief of Appellant.

A. THE APPELLEE IS NOT BARRED FROM POST-CONVICTION RELIEF BECAUSE HE HAD PREVIOUSLY RAISED THE ISSUE IN THIS COURT AND THE SUPREME COURT OF THE UNITED STATES.

On appeal to this Court, the defendant argued, inter alia, substantially the identical issue presented in his motion for post-conviction relief, which argument was rejected by the Court. However, less than three weeks after the court denied the defendant's petition for rehearing, the United States Supreme Court granted a writ of certiorari in Enmund v. Florida, and announced its decision in that case on July 2, 1982. ___ U.S. ___, 102 S.Ct. 3368 (1982). The Court's holding in that case is that the Eighth Amendment does not permit imposition of the death penalty on one such as the instant defendant who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place. The effect of this decision is, of course, to render the defendant's death sentences unconstitutional.

Since the Enmund decision represents a "change in the law," the defendant's sentence is subject to attack under Rule 3.850.

Witt v. State, 387 So.2d 922 (Fla. 1980). In Witt, this Court spoke of the type of "change in the law" which would be cognizable under Rule 3.850. The Court stated:

> The first are those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties. This category is exemplified by Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), which held that the imposition of the death penalty for the crime of rape of an adult woman is forbidden by the eighth amendment as cruel and unusual punishment. Witt v. State, supra at 929.

The instant situation is of course identical to that in Coker, and compels the conclusion that not only is the defendant's claim properly presented under Rule 3.850, but also that his motion was properly granted.

The appellant's assertion attacking significance to the fact that the Supreme Court of the United States denied the defendant's petition for writ of certiorari flies in the face of legions of decisions of that Court in which it has been held that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." Anderson v. Atlantic Coast Line Railroad Co., 350 U.S. 807 (1956). See also Stern and Gressman, Supreme Court Practice, p. 353-360 (BNA 1978).

Additionally, the State argues in a footnote that the decision in Enmund v. Florida is not a change in the law. Certainly the sixteen page dissenting opinion in that case, referred to by the appellant, would vociferously disagree.

B. THIS COURT'S HALL AND RUFFIN DECISIONS ARE TOTALLY INAPPOSITE TO THE INSTANT CASE.

The appellant's continued reliance upon this Court's decisions in Ruffin v. State, 420 So.2d 591 (Fla. 1982) and Hall v. State, 420 So.2d 872 (Fla. 1982) defies reason. The appellee contends that while this Court correctly declined to apply Enmund in Ruffin and Hall, the instant case is vastly different from those two.

In Ruffin, the Court found that the evidence is "abundantly clear and sufficient to demonstrate Ruffin's joint participation in the premeditated murder of Karol Hurst," that Ruffin "knew that Hall was going to kill her," and that Ruffin fired shots at a police officer. Ruffin v. State, supra at 594.

Similarly, in Hall, the Court found that the defendant was an aider and abettor not only in the underlying felony, but in the homocide as well. "There is no doubt in the Court's mind that Hall intended Mrs. Hurst's death" Hall v. State, supra at

In stark constrast, the instant defendant did not know that anyone was going to be killed, and in fact objected to any killing. He certainly did not participate in the homicides or fire shots as the defendants in Hall and Ruffin. Very simply, the defendant's case is a classic Enmund situation, and is readily distinguishable from Hall and Ruffin.

C. THE RECORD CLEARLY ESTABLISHES THAT THE DEFENDANT NEITHER KNEW NOR INTENDED THAT THE HOMOCIDES WOULD TAKE PLACE.

The appellee will attribute the gross misstatement which appears on page 15 of the appellant's brief to the necessary

haste with which the brief was prepared. The statement that "the defendant planned the murder in the defendant's motel room" is not supported by one shred of evidence, and is directly contrary to all of the evidence presented. Further, the evidence which the state relies upon to demonstrate that the defendant "intended to kill" is evidence of his participation in a robbery, not a homocide. Clearly the defendant objected to the homocides, and refused to aid in the disposal of the weapons.

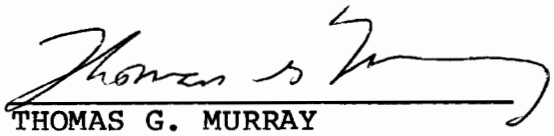
The trial judge, after careful consideration of the facts in this case found that the Enmund case applies, thereby finding that the defendant did not kill, attempt to kill or intend the killing of another. This finding is supported by the evidence. The trial court's ruling should be upheld by this Court.

CONCLUSION

Based upon the foregoing cases and authorities, the appellee respectfully requests this Court to affirm the ruling of the lower court.

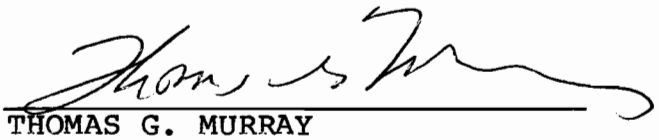
Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 Northwest 12th Street
Miami, Florida 33125

By: 
THOMAS G. MURRAY
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the CALVIN FOX, Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 31st day of January, 1984.



THOMAS G. MURRAY
Assistant Public Defender