THE SUPREME COURT OF FLORIDA

MARK ANDREW BURCH,

APPELLANT,

vs.

THE STATE OF FLORIDA,

APPELLEE.

CASE NO. 65-168

APPELLEE'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief the parties will be referred to as the State and the defendant.

The symbol "R" will be used to denote the record on appeal.

All emphasis in this brief is supplied by the Appellee unless otherwise indicated.

STATEMENT OF THE CASE

The state accepts the defendant's statement of the case with the following correction:

The final split of the first, hung jury was ten votes for First Degree Murder and two votes against. The jury also split 10 votes for Second Degree Murder and two votes against (R679).

STATEMENT OF THE FACTS

The state accepts the defendant's statement of the facts with the following additions and for corrections:

Folsom testified that the defendant told him he was going to take care of it in reference to the dispute between the victim and Folsom and Carr (R.807-808). He further testified that although the defendant was hyper he could communicate clearly (R.835).

Billy Hahn testified that the defendant told the victim he didn't like the way he smacked his friends around before he shot the victim (R.858).

Elida Hahn testified that the defendant approached her with a shotgun and asked her where the victim's apartment was (R.887).

Mahon's testimony was that the defendant told him a white nigger had slapped somebody when he picked up the gun (R.1006).

Betty Robson testified the defendant was acting strange but she said she wouldn't say he was two thirds drunk (R.1056).

Dr Tate testified that the victim was shot at close range (R.880), that the blast destroyed both of the victim's kidneys and completely transceted the victim's aorta, pancreas, stomach, liver and right lung (R.884). He stated the victim would have been conscious for at least a minute and died within 3 to 5 minutes (R.884).

In his attempt to introduce the testimony of Dr. Roche, the defendant's counsel stated that Dr. Roche's testimony was not being offered to for the purpose of showing whether or not the defendant could form specific intent (R.1080).

Dr. Bernston testified that his opinion regarding the defendant's intake of drugs was based solely on what the defendant told him (R.1308-1313). He further stated the defendant was sane by legal criteria, (R.1312), and that a person suffering from an antisocial personality disorder would have the capacity to know what was wrong under the law (R.1310-1311).

POINTS INVOLVED

POINT I

WHETHER THE TRIAL COURT PROPERLY EXCLUDED TESTIMONY OF THE TOXICOLOGIST ABOUT THE EFFECTS OF THE DRUG "PCP" ON THE HUMAN BODY?

POINT II

WHETHER THE TRIAL COURT PROPERLY REFUSED TO APPOINT DR. LERNER TO ASSIST THE APPELLANT IN THE PREPARATION OF, AND PRESENTATION OF HIS DEFENSE OF VOLUNTARY INTOXICATION?

POINT III

WHETHER THE TRIAL COURT PROPERLY IMPOSED THE DEATH PENALTY?

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY EXCLUDED TESTIMONY OF THE TOXICOLOGIST ABOUT THE EFFECTS OF THE DRUG "PCP" ON THE HUMAN BODY.

Defendant asserts that the trial court erred in excluding the testimony of Dr. Roche, a toxicologist, regarding the affects of "PCP" on the human body because, he asserts, the doctor's testimony was relevant to the defendant's voluntary intoxication defense.

The state disagrees.

The trial court below excluded the doctor's testimony for the reason that there was no evidence, except the defendant and his witnesses' assertions that the drug he ingested was PCP. As section 90.702 Fla. Stats. (1976) provides:

> TESTIMONY BY EXPERTS. - If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial[.],

the state asserts that the trial court below correctly ruled that Dr. Roche's testimony was not relevant to the evidence adduced at trial.

This Court Cirack v. State, 201 So.2d 706, 709 (Fla. 1967), held that the "rules relating to opinion evidence

likewise require that the opinion of an expert be based on facts in evidence, or within his knowledge." In Cirack, supra, the doctor's opinion was based entirely on the unsupported, self-serving declarations of the defendants that Cirack had consumed quantities of alcohol and had not eaten properly for three days prior to committing the murder. This Court reasoned that as there was no evidence adduced to support the defendants assertions of the amounts of alcohol consumed by them, and that the doctor's opinion was based upon these assertions, the doctor's opinion was hearsay evidence not admissible at trial. Id at 709.

Clearly, this was precisely the reasoning of the trial court in excluding the testimony of Dr. Roche. Below, the defendant introduced three witnesses, Sandra Marini, Barbara Cooper and Angela Brady, who testified that they believed the defendant used "PCP". Ms. Marini testified that she observed the defendant use a blue or purple powder that she believed was "PCP" (R. 1099-1100). She further testified that she herself did not use drugs (R. 1108). Angela Brady, a barmaid in a bar the defendant frequented, testified that she had observed the defendant snort a white powdery substance she believed to be "PCP" (R. 1127-1128). Barbara Cooper testified that the defendant had lived in her household for about nine months and that she believed he used "PCP", as well as cocaine and marijuana (R. 1113-1114). She described "PCP" as a white powdery substance (R. 1114). She

further described the defendant's behavior while he was under "PCP" as either the defendant either being unable to talk or carry on a conversation or as talking "your ear off" (R. 1123-1124).

The defendant also testified that he used "PCP" on a regular basis (R. 1133-1137). However, only one of the witnesses, Ms. Cooper, testified that she had ingested "PCP" with the defendant, (R. 1120), but she did not testify that she ingested drugs with the defendant around the time of the crime, rather she testified that she didn't remember whether she saw the defendant on the day of the murder (R. 1123). Further, the defendant did not introduce the results of, or ever request, a blood test, showing the presence of "PCP" in his blood stream. Clearly there was no evidence, but for the self-serving declarations of the defendant that he consumed PCP on the day the crime was committed.

Defendant has cited numerous federal cases for the proposition that lay witnesses may be used to identify suspect material as a particular controlled substance where more direct evidence was not available. A review of the facts of those cases reveals that they are distinquishable from the case at bar. In those cases the witnesses testified to prior experiences with the drug, to sampling the actual substance in controversy and finding its effects to be similar to those previously experienced by the witness with the same drug. United States v. Sweeney, 688 F.2d 1131 (9th Cir. 1982); United

States v. Jones, 480 F.2d 954 (5th Cir. 1973); United States v. Atkins, 473 F.2d 308 (8th Cir. 1973); Ewing v. United States, 386 F.2d 10 (9th Cir. 1967).

Here, however, only one witness other than the defendant, Ms. Cooper, testified to ingesting "PCP" with the defendant, (R. 1120), and her testimony in that regard neither confirmed the substance as "PCP" nor was sufficiently connected in time to the murder to support the defendant's self-serving assertions that he was under the influence of "PCP" when he committed the murder.

In Fouts v. State, 374 So.2d 22 (Fla. 2nd DCA 1979), the Second District held that the trial court improperly excluded the defendant's expert witness on the effects of "LSD". There, unlike here, the trial court found that the defendant had sufficiently established a rational inference that he had ingested "LSD" by adducing the testimony of his cell-mate, who ingested some of the substance at the same time as the defendant, described both his and the defendant's reactions to the drug and described the effects as being similar to his previous experience with LSD. Clearly, the defendant made no such showing below.

Defendant also cites the case of Mullin v. State, 425 So.2d 219 (Fla. 2nd DCA 1983), wherein the Second District noted in dictia that the trial court improperly excluded the defendant's expert regarding the effects of sniffing glue on the human body. There, unlike here, the defendant appeared

"high" when arrested and was found to have two tubes of glue in his pocket, one used up and one unused. Below, no "PCP" or paraphernalia was found on the defendant when he was arrested; the testimony of the witnesses to the murder was that the defendant calmly walked up to the apartment complex, inquired where the victim lived, knocked on the victim's door, exchanged a few words with the victim, shot him, closed the door and walked away. (R. 855-858, 868-870, 886-887, 892-894, 899-900).

The state contends the trial court below correctly excluded the testimony of Dr. Roche as there was no evidence adduced below, with the exception of the defendant's self-serving declarations, to establish that the defendant was under the influence of "PCP" at the time he committed the murder. Therefore Dr. Roche's testimony could not be "applied to evidence at trial." §90.702 Fla. Stats. (1976); Cirack, supra.

A trial court has wide discretion concerning the admissibility of evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed. Jent v. State, 408 So.2d 1024, 1029 (Fla. 1982), cert. denied, 457 U.S. 1111; Rivers v. State, 425 So.2d 101 (Fla. 1st DCA 1983). As the trial court clearly did not abuse its discretion in excluding Dr. Roche's testimony, the trial court's ruling should be affirmed.

POINT II

THE TRIAL COURT PROPERLY REFUSED TO APPOINT DR. LERNER TO ASSIST THE APPELLANT IN THE PREPARATION OF, AND PRESENTATION OF HIS DEFENSE OF VOLUNTARY INTOXICATION.

Defendant asserts that he had a right to appointment of a particular expert, Dr. Steven Lerner, to assist him in the preparation and presentation of his defense of voluntary intoxication by "PCP."

The state asserts the trial court was correct for several reasons.

The state agrees with the defendant that indigent defendants are entitled to the assistance of an expert when such is necessary to their defense. Alvord v. Wainwright, 564 F. Supp. 459, 484 (M.D. Florida, 1983), aff'd as modified 725 F.2d 1282 (11th Cir. 1984); Hoback v. Alabama, 607 F.2d 680, 682 n.1 (5th Cir. 1979); Gray v. Rowley, 604 F.2d 382 (5th Cir. 1979). Indeed, it has been held that fundamental fairness is violated when a criminal defendant is denied the opportunity to have an expert examine a piece of critical evidence whose nature is subject to varying expert opinion. Gray, supra; White v. Maggio, 556 F.2d 1352 (5th Cir. 1977). The evidence must be both critical and subject to carrying expert opinion. Gray, supra; White, supra. Critical evidence is material evidence of substantial probative force that could induce a reasonable doubt in the minds of enough jurors to avoid a conviction. Gray, supra; White, supra.

As argued in Point I, infra, the state asserts that testimony regarding the effects of "PCP" on human behavior, whether by Dr. Lerner or Dr. Roche, was not material in this case in the absence of evidence that the defendant was under the influence of "PCP" when he committed the murder. Cirack v. State, 201 So.2d 706 (Fla. 1967). Thus the trial court properly denied the defendant's request to have Dr. Lerner appointed as an expert.

The thrust of the defendant's argument on this point is that he was entitled to the appointment of a particular expert, Dr. Lerner, in this case. It has never been held that an indigent defendant is entitled to the appointment of a particular expert.

Initially, the state observes that while this defendant asserted that he could not find a local expert with Dr. Lerner's expertise, (R.97, 1494-1496), that assertion is belied by the defendant's request for appointment of Dr. Keith Burnstein and Dr. Dan Roche (R. 685-686, 1503-1504). The trial court granted that request (R.691,1505). The trial court also granted the defendant's request that Dr. Arthur Stillman, also local, be appointed to examine the defendant (R. 20-22). Simply because the defendant was not satisfied with the opinion of Dr. Stillman, (R 61-62), does not entitle him to appointment of particular expert, who will give the opinion testimony he desires. Blake v. Zant, 513 F. Supp. 722,784 (S.D. Georgia 1981). That the trial court and the state were amenable to the appointment of numerous other local and less costly experts is clear from the record (R 21-22,

74, 691). Indeed two additional local experts, Drs. Burnstein and Roche, were appointed (R691). Thus the trial court's denial of the defendant's request for Dr. Lerner was correct.

Finally the state asserts that the defendant's right to the assistance of an expert is quite similar to a defendant's right to counsel. In both instances the entitlement exists to ensure fundamental fairness to the defendant. White, supra; Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963). However, a defendant has never been entitled to a particular attorney. United States v. Hobson, 672 F.2d 825 (11th Cir. 1982); United States v. Gray, 565 F.2d 881 (5th Cir. 1978); Williams v. State, 427 So.2d 768 (Fla. 2nd DCA 1983); Witty v. State, 346 So.2d 1221 (Fla. 3rd DCA 1977). Certainly if the defendant was not entitled to select a particular attorney, he can not be entitled to select a particular expert.

The state asserts that in light of the trial court's obvious willingness to appoint experts for the defendant; the defendant eventually being able to find local experts who were appointed, and the ultimate inadmissibility of the testimony, the trial court properly denied the defendant's request for the appointment of Dr. Lerner.

POINT III

THE TRIAL COURT PROPERLY IMPOSED THE DEATH PENALTY

Defendant asserts the trial court improperly imposed the death penalty on him by finding the homicide was especially heinous atrocious or cruel, was cold calculated and premeditated and by failing to find the statutory mitigating circumstance that the defendant's capacity to appreciate the criminality of his acts and to conform his conduct to the requirements of law was substantially impaired.

The state asserts the trial court properly found four aggravating circumstances applied: (1) the defendant was under sentence of imprisonment, to wit: on parole (which the defendant does not challenge on appeal); (2) the defendant was previously convicted of a felony involving the use of violence to some person (which the defendant does not challege on appeal); (3) that the homicide was especially heinous atrocious or cruel; and (4) the homicide was committed in a cold calculated and premeditated manner. The trial court also found one non-statutory mitigating circumstance to exist: that the defendant had a tumultuous childhood with little, or no, parental guidance (R1376). The trial court properly found no statutory mitigating circumstances applied (R.1375).

The state asserts that the trial court properly found this murder was especially heinous, atrocious or cruel. Below, the medical examiner testified that the victim was shot in the abdomen at close range, (R.880); the blast destroyed

both the victims kidneys, passed completely through the arota, pancreas, stomach, liver and right lung (R.884); the victim remained conscious for more than a minute after the wound (R.884), and that it took at least three to five minutes before the victim died (R.879,884). Furthermore, while the victim and the defendant did not know each other, the defendant sought out the victim and shot him in his own home (R.855-856, 1145).

A finding that a murder was especially heinous, atrocious or cruel has been sustained where the victim was killed while in his own bed, Spink ellink v. State, 313 So.2d 666 (Fla. 1975); Proffitt v. State, 315 So.2d 461 (Fla. 1975); and where the crime is unnecessarily tortuous to the helpless victim. State v. Dixon, 283 So.2d 1 (Fla. 1973); Hargrave v. State, 366 So.2d 1 (Fla. 1978). Clearly the circumstances, here in, where the victim was confronted in his own home, shot and left to die a painful death, support the trial court's finding that the murder was especially heinous, atrocious and cruel.

Secondly, defendant asserts that the trial court erred in finding the murder to be cold, calculating and premeditated. The state asserts that a clearer case of premeditation could hardly be made. Below, two of the state's witnesses testified that the defendant asked them to drive him to an apartment and they agreed, (R.760,808). One of the witnesses testified that prior to asking for a ride the defendant stated that he would take care of it in reference to the witness' altercation with

the victim (R.807-808). When the defendant reached the apartment he asked the witness to wait and returned shortly with a shotgun (R.761,808-809). The defendant asked to be dropped off near the apartments where the victim lived (R.762,809). The defendant told one of the witnesses that they didn't deserve to be treated that way and that he was going to kill the victim (R.763). He told the witnesses to meet him later at the donut shop (R.763,810). Later the defendant met these witnesses at the donut shop, without the gun, requested a ride to another place and confessed to killing the victim during the ride (R.763-765, 810-812).

Two witnesses who lived next door to the victim testified that the defendant walked towards them carrying a shotgun, pointed it at each of them in turn and asked if they knew the victim or where his apartment was (R.855-856, 885-887). The defendant proceeded to the victim's apartment, knocked on the door and asked the victim if he was Allen (R.857-858,887). One of the witnesses testified that he heard the defendant tell the victim he didn't like the way he (the victim) smacked around his friends (R.858). The defendant then shot the victim, shut the door with the shotgun and walked away (R.858,887). The defendant put the shotgun in a dumpster (R.858).

Simply because, as defendant asserts, he did not know the victim before he shot him, does not make this any less a contract or execution type murder. See Sullivan v. State, 303 So.2d 632 (Fla. 1974). The evidence adduced at trial overwhelmingly established that the defendant coldly, calculatedly

and premeditatedly set out to kill the victim. Combs v. State, 403 So.2d 418 (Fla. 1981). The defendant clearly formed an intent to commit the crime when he told Folsom that he would take care of it.

He then procured the weapon, went to the victim's apartment complex, asked the Hahns if they knew the victim or where his apartment was, went to the victim's apartment and shot him. This is not a case like Cannady v. State, 427 So.2d 723 (Fla. 1983); McCray v. State, 416 So.2d 804 (Fla. 1982); or Washington v. State, 432 So.2d 44 (Fla. 1983) where there was no evidence of the planning of the murder prior to its occurrance. Clearly here the state established the defendant acted through a premeditated design and the trial court properly applied this aggravating factor.

Lastly the defendant complains that the trial court erred in not applying the statutory mitigating factor that the defendant lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, on the basis of Dr. Bernston's testimony.

A review of Dr. Bernston's testimony however, reveals the trial court's ruling was correct. Dr. Bernston testified that his opinion was based solely on what the defendant told him about the drugs he had ingested.(R.1308,1313). He further stated that the defendant was sane by legal criteria, (R.1312), and that persons suffering (as the defendant was) from an antisocial personality disorder would know the nature and quality of their acts; would know what was wrong under the law

(R.1310-1311). Thus Dr. Bernston's testimony was equivocal at best regarding the defendant's capacity to appreciate the criminality of his acts and the trial court properly disallowed this mitigating factor.

Even if this Court should find the trial court improperly applied the particularly heinous, atrocious and cruel aggravating factor, there still exist three statutory aggravating factors, no statutory mitigating factors and one non-statutory mitigating factor. Clearly the aggravating factors outweigh the mitigating factor and the trial court properly imposed the death penalty.

Additionally the jury recommended imposition of the death penalty by a nine to three vote. (R.1547). A jury recommendation as to imposition of the death penalty should be accorded great weight. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The trial court properly followed the jury recommendation.

Lastly the defendant asserts that the death penalty as imposed against him is disproportionate to sentences imposed against others for similar crimes. This argument was disposed of in Alvord v. State, 322 So.2d 533 (Fla. 1975), wherein this Court stated "[s]uch an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death... in the other case." Id at 540.

CONCLUSION

THEREFORE, based upon the foregoing reasons and authorities cited herein, Appellee respectfully requests that the Judgment and Sentence of the trial court be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished, by United States Mail, to H. DOHN WILLIAMS, ESQUIRE, Varon, Bogenschutz, Williams and Gulkin, P.A., 2432 Hollywood Boulevard, Hollywood, Florida 33020, this 17th day of December, 1984.

Sarah B Mayer
Of Counsel