IN THE SUPREME COURT OF FLORIDA

JACOB JOHN DOUGAN, JR.	:	
Appellant	:	
-vs-	:	
STATE OF FLORIDA,	:	CASE NO. 65,217
Appellee	:	
	:	

FILED
SID J. WHITE
SEP 17 1984
CLERK, SUPREME COURT
By Chief Deputy Clerk

ON APPEAL FROM THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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Preliminary Statement

The Appellant, Jacob Dougan, will be referred to herein by name or as "Appellant". The Appellee, State of Florida, will be referred to herein as the "State".

The Records on Appeal and transcripts of Appellant's trial in 1975 and 1979 resentencing hearing are contained in this Court in the file of Appellant's original appeal styled Barclay & Dougan v. State, No. 47,260. That record, insofar as it relates to Jacob Dougan, is incorporated by reference.

References to the Record on Appeal of Appellant's trial will be designated "RT"; references to the transcripts of the guilt/innocence phase of Appellant's trial will be designated "T Trial"; references to the transcript of the penalty phase of trial will be designated "T Trial Penalty Phase"; references to the six (6) volume Record on Appeal of Appellant's Gardner resentencing hearing will be designated "RG" followed by the appropriate volume number; references to the transcript of the motion to suppress evidence held in the trial court on November 8, 1974 will be designated "TMS"; references to the Presentence Investigation Report of Appellant will be designated "P.S.I.".

ARGUMENT

I.

APPELLANT'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE PROVISIONS OF FLA. STAT. §921.141, IMPOSED IN AN ARBITRARY AND CAPRICIOUS MANNER AND DEPRIVED APPELLANT DUE PROCESS AND EQUAL PROTECTION OF LAW AS GUARANTEED BY FLA. CONST. ART. I, SECS. 2, 9 AND 17 AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Appellant's death sentence must be reversed because aggravating circumstances were erroneously applied

With great effort, the State attempts to circumvent and avoid the fact that the aggravating circumstances set out in Fla. Stat. §921.141(5)(a) & (b) were found by the trial court. It is impossible for the State to even attempt to justify the trial court's finding of these aggravating circumstances, so the State simply tries to pretend that the trial court didn't make these findings.

Fortunately, the trial court's findings are too clearly documented in the record.

In the trial court's sentencing order (RT 217-247), the trial court has divided its analysis of mitigating circumstances and its analysis of aggravating circumstances into two separate and distinct sections, mitigating circumstances were considered first (RT 226-234), aggravating circumstances were considered second (RT 235-244). This format was repeated in the trial court's Gardner resentencing order (RG Vol. I 138-144 and 145-154).

The trial court's analysis of each of the eight statutory aggravating circumstances was divided into the trial court's statement of the "Facts", followed by the trial court's "Conclusions" as to whether that particular aggravating circumstance existed. In analyzing the aggravating circumstances set out in Fla. Stat. §921.141(5)(a) & (b), the trial court, in its "Conclusions", clearly and unambiguously found each of these aggravating circumstances to exist. (RT 236, 236-237). These findings were repeated in the trial court's Gardner resentencing order. (RG Vol. I at 145, 146).

Since these findings are wholly without support either in the record or in reality, the trial court committed error.

Appellant relies on the arguments made in his Initial Brief concerning errors made by the trial court in its other findings of aggravating circumstances.

B. Appellant's death sentence must be reversed because applicable mitigating circumstances were improperly rejected or not considered at all.

The State argues that the mitigating circumstance set out in Fla. Stat. §921.141 (6)(a) ["no significant history of prior criminal activity"] is not applicable to Appellant "because of the contempt convictions, traffic charge and then pending murder charge [which was subsequently dismissed]" (State's Brief at 23).

It is strange that the State, at this late date, makes this argument since the same State, at trial, conceded that Jacob Dougan had no history of prior criminal activity (T Trial Penalty

Phase at 114). In the original direct appeal of this case, without any advocacy whatsoever on this issue by Appellant's then counsel, this Court expressly found that Jacob Dougan had no significant history of prior criminal activity. Barclay & Dougan v. State, 343 So.2d 1266, 1270 (Fla. 1977).

The trial court's sole reason for rejecting this mitigating factor was "because the facts of the Contempt of Court are not known at this time" (RT 227). This finding was repeated in the Gardner resentencing order (RG Vol. I at 139). The State is now attempting to have this Court, on appeal reevaluate the evidence and find two additional grounds for rejecting this mitigating factor, i.e., the since nol prossed murder charge and a traffic charge[1].

The trial court explicitly, and properly, refused to find that these two grounds negated the §(6)(a) mitigating factor. In its sentencing order, in analyzing the §(6)(a) mitigating circumstance, the trial court specifically stated, "[t]he additional murder charge cannot be considered because he [Appellant] has not yet been tried on that charge." (RT 227) (emphasis added). In the Gardner resentencing order, the trial court specifically stated, "[t]he additional murder charge cannot be considered because it was nol prossed after this Court's death sentence in April, 1975" (RG Vol. I at 139) (emphasis added).

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1. Surely the State can't seriously argue that a traffic offense incurred while Jacob Dougan was a teenager constitutes a "significant history of prior criminal activity."

This leaves only the trial court's finding of the contempt conviction as its sole reason for rejecting the §(6)(a) mitigating circumstance. As discussed in Appellant's Initial Brief at pp. 11-12, contempt of court does not constitute a "crime".

This issue easily lends itself to analysis under the age-old dictum that what looks like a duck, sounds like a duck and walks like a duck must be a duck. Conversely, that which cannot even muster a quack must not be a duck. Contempt of court does not resemble a crime: it may be adjudicated summarily; there is no right to trial, much less trial by jury, before contempt is adjudicated; there is no constitutional requirement that contempt be proven beyond a reasonable doubt. Actions which violate no law may still constitute contempt of court. Simply stated, contempt of court is not a crime.

Anyhow, Jacob Dougan's one day sentence for contempt of court can hardly be deemed a "significant history of prior criminal activity".

Appellant relies on the arguments made in his Initial Brief concerning errors made by the trial court in its other findings concerning mitigating circumstances.

II.

THE STATE AT THE PENALTY PHASE OF APPELLANT'S TRIAL INTRODUCED BEFORE THE JURY EVIDENCE OF A NON STATUTORY AGGRAVATING CIRCUMSTANCE IN VIOLATION OF FLA. STAT. §921.141 AND IN VIOLATION OF RIGHTS GUARANTEED BY FLA. CONST. ART. I, SECS. 2, 9 AND 17, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State, in its Brief, implies that no objection was made to the State's introduction at the penalty phase of Appellant's trial, as a non-statutory aggravating circumstance, evidence of Appellant's alleged involvement in a second homicide for which Appellant had been indicted but not convicted.

This claim by the State is truely dumbfounding. There was probably no evidence more vigorously objected to during the entire trial. The objections and arguments concerning the admissibility of this evidence covers some twenty-five (25) pages of transcript. (T Trial Penalty Phase 30-55).

Specifically, Appellant's counsel objected to the introduction of this evidence (T Trial Penalty Phase at 30-36), specifically arguing that it constituted a non-statutory aggravating circumstance (Id. at 35). The State argued that it was admissible as an aggravating factor (Id. at 36-39). Appellant's counsel repeated his objection that aggravating factors are limited to those enumerated in the statute [Fla. Stat. §921.141] (Id. at 41).

The State in its Brief argues that evidence of the existence of pending criminal charges of which the defendant has not been convicted should be allowed in aggravation "as being necessary to

an individualized sentence" (State's Brief at 27). If that is the State's position, it should request that the Legislature make this change in the death penalty statute. However, as the statute was written at the time of Jacob Dougan's trial and as it remains written today, evidence in aggravation is limited to those aggravating circumstances enumerated by the statute.[2] E.g., Elledge v. State, 346 So.2d 998 (Fla. 1977); Miller v. State, 373 So.2d 992 (Fla. 1979); Perry v. State, 395 So.2d 170 (Fla. 1981).

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2. The wisdom of the policy of prohibiting the introduction of pending criminal charges as aggravating circumstances is borne out by this case. After Appellant was sentenced to death, the State nol prossed the second homicide indictment. In announcing to the press the decision to nol pros the indictment, the prosecutor conceded that Appellant was not directly involved in the second homicide but was "kept in the case for strategic reasons, to make it more attractive and presentable to the jury." Jacksonville Journal, April 15, 1975. Of course the State never conceded any of this to the jury at Appellant's trial who heard evidence of this second indictment as an aggravating circumstance--the primary aggravating circumstance argued by the State Attorney to the jury in support of a sentence of death for Appellant.

III.

THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AT THE PENALTY PHASE OF APPELLANT'S TRIAL IMPROPERLY RESTRICTED THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES, INSTRUCTED THE JURY TO CONSIDER NON STATUTORY AGGRAVATING CIRCUMSTANCES, FAILED TO INSTRUCT THE JURY ON THE STATE'S BURDEN TO PROVE AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT AND FAILED TO DEFINE THE STATUTORY AGGRAVATING CIRCUMSTANCES IN VIOLATION OF FLA. STAT. §921.141, FLORIDA LAW, FLA. CONST. ART. I SECS. 2, 9 AND 17, AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State, in its Brief (at pp. 32-33), cites several cases in support of its position that the trial court's instructions to the jury at the penalty phase of Appellant's trial did not restrict the jury's consideration of mitigating circumstances while instructing the jury to consider non-statutory aggravating factors. In all of the cases cited by the State, the jury was instructed that they could only consider statutory aggravating factors; the jury was then given a less restrictive instruction on mitigating factors. *E.g.* *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1983) (*en banc*).

In Appellant's case the exact opposite occurred: the jury was first instructed that aggravating circumstances included "the evidence the Court deems to have probative value *and also* [the statutory aggravating circumstances]"; the jury was then instructed that mitigating circumstances were those enumerated by statute. (T Trial Penalty Phase 170-172).

IV.

THE PROSECUTOR'S CLOSING ARGUMENT AT THE PENALTY PHASE OF APPELLANT'S TRIAL WAS IMPROPER, PREJUDICIAL AND INFLAMMATORY IN VIOLATION OF FLORIDA LAW AND DENIED APPELLANT DUE PROCESS OF LAW, A RELIABLE SENTENCING DETERMINATION AND FUNDAMENTAL FAIRNESS IN VIOLATION OF FLA. CONST. ART. I SECS. 2, 9 AND 17 AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State makes no attempt to justify the acts of prosecutorial misconduct specifically noted in Appellant's Initial Brief.

Counsel for Appellant's co-defendant Elwood Barclay objected to the inflammatory and prejudicial nature of the State Attorney's closing argument at the penalty phase of trial and moved for a mistrial based on these objections. (T Trial Penalty Phase 129-131). *Cf.* *Cumbie v. State*, 380 So.2d 1031, 1033 (Fla. 1980). Counsel for Appellant joined in the motions made by Barclay's counsel and stated further, specific objections to the prosecutor's closing argument. (T Trial Penalty Phase 131-132).

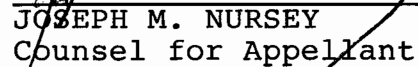
ISSUES V - IX

Appellant relies on the arguments made in his Initial Brief in support of these issues.

CONCLUSION

Based on the foregoing and argument previously made to this Court in Appellant's Initial Brief, Appellant's conviction and sentence should be reversed.

Respectfully submitted,



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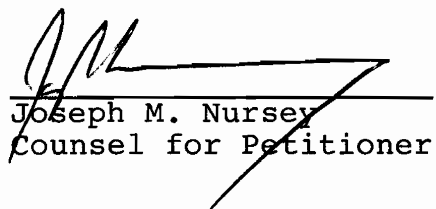
CERTIFICATE OF SERVICE

I hereby certify that I have this day served counsel for the opposing party with a copy of the foregoing pleading, by placing same in the U.S. Mail with adequte first-class postaged annexed thereto, addressed to Mr. Wallace Allbritton, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301-8048.

This 13th day of September, 1984.



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