IN THE SUPREME COURT OF FLORIDA

ERNESTO SUAREZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,260

BRIEF OF APPELLEE

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SUMMARY OF THE ARGUMENT

I.

The trial court exercised its discretion and appointed an interpreter for the Appellant. It ruled as a matter of fact that the interpreter was present during the whole trial for the benefit of the Appellant. If the Appellant chose not to use those services for contemporaneous translation of the trial, he in effect, voluntarily absented himself from the trial. The only basis of the Appellant's argument that he was entitled to personal advice from the trial court of his alleged right to instantaneous translation of the court proceedings for his benefit is found in dicta in one case that specifically distinguished cases with facts similar to the facts presented here.

II.

Assuming, arguendo, that there was an ethical violation in the Assistant State Attorney's interview with the Appellant, then the remedy is the imposition of sanctions against the offending attorneys not exclusion of the evidence. The only

justifiable reasons that support the exclusionary rules applied by courts are to keep unreliable evidence out or to indirectly promote policy goals where the Court cannot exert direct power. Neither goal will be served by the suppression sought by the Appellant especially given the way the statements were used. They were not introduced into evidence but were used instead in the cross-examination of the Appellant when he took the stand. It was not introduced into evidence.

III.

The Appellant is here complaining of error he invited to the extent that he complains that the trial court should have conducted personal examinations of co-defendant's before approving their invocation of their rights under the Fifth Amendment. The Appellant's trial counsel said he would accept counsel's word that co-defendant Sory would invoke his rights not to answer the questions he sought to propound. And, he proclaimed himself satisfied with Reye's counsel's similar assertion after counsel conferred with him in the lock up. The question he wanted to ask would have incriminated both co-defendants because he would have placed both of them at the crime scene.

IV.

The Appellant's argument under this point misapprehends the difference between the jury's function and that of the trial court in assessing the appropriate penalty for any given first-degree murderer. The jury must have a complete list from which to choose so that it can exercise its function of making choices and then weighing. While the Court, on the other hand, must set out the factors it finds in both aggravation and mitigation and then weigh them. To impose a limited list on the jury, invades its province as this Court ruled in Straight v. Wainwright, infra.

V.

(A)

The evidence and facts in this case clearly support the trial court's finding that the Appellant knowingly endangered the lives of a great number of people. After noticing a marked police vehicle in pursuit, the Appellant, with four passengers in his car, picked up speed, ran a red light, a stop sign, forced vehicles off the road, nearly causing a head-on collision, drove onto the shoulder of the road to avoid a rolling road block established by other police vehicles and then after coming to a stop, opened fire with a semi-automatic rifle spraying some fourteen rounds on four deputy

sheriffs, killing one. It was reasonably foreseeable that his actions placed the lives of a great many people in great danger. The argument offered by the Appellant overlooks both the reasonably foreseeable aspect of this factor and ignores the evidence from the chase focusing instead on the simple number of people in the Appellant's field of fire. It simply fails to address either the relevant legal standard for measuring the existence of this factor or the facts supporting the circuit court's determination that this factor was present.

(B)

The Appellant's argument under this point misapprehends the nature of the prohibition against doubling in the application of aggravating factors in the assessment of whether the death penalty is appropriate in a given situation. It is not the fact that the facts supporting more than one factor occurred at the same time or as part of the same sequence of events but rather whether they are based on the same evidence and aspect of the crime. Here the murder came because the victim was a police officer who was about to arrest him and it also occurred while the Appe-lant was trying to make good his get away

from a robbery. There is no more a doubling problem here than there was in Squires v. State, infra (status as an escapee and prior life felony convictions both properly counted).

(C)

The Appellant's contention that the trial court improperly considered lack of remorse as an aggravating factor and injected his personal beliefs and suppositions into the weighing process is without merit. It does not enjoy the support of the record. The record establishes that the Court was simply philosophising and explaining why death was the right result. This Court has previously held that a Court may do so without fear of reversal. And, the comments about the Appellant are no more than a different and more judgmental characterization of the testimony of the psychiatrist who testified about the Appellant. Finally, there were three valid aggravating factors and no mitigating factors so death was presumptively the correct sentence.

(D & E)

There is no requirement that a trial court find mitigating factors to be present if there is evidence that might arguably support it. The only requirement is that the Court consider it. The Court has repeatedly rejected this line of argument in the past and should do so again in this case.

PRELIMINARY STATEMENT

ERNESTO SUAREZ will be referred to in this brief as the "Appellant". The STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal will be referred to by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Appellee accepts the Statement of the Case and Facts as set forth in the Appellant's brief as a substantially accurate account of the proceedings below with the exceptions shown in the Argument portion of this brief.

ISSUE I

BECAUSE HE DID NOT UNDERSTAND ENGLISH, ERNESTO SUAREZ WAS DENIED HIS RIGHTS TO CONFRONTATION AND DUE PROCESS WHERE HE DID NOT RECEIVE CONTEMPORANEOUS TRANSLATION OF THE TESTIMONY GIVEN IN ENGLISH AT HIS TRIAL.

(As Stated by Appellant).

Under this point, the Appellant contends that the circuit court erred to his prejudice in not personally informing him of his right to have a simultaneous translation of the events of his trial. The Court below found that the Appellant's counsel requested the services of an interpreter for the benefit of the Appellant and the Court appointed one. (R. 1465). The Court also found that that interpreter was present during the whole trial for the benefit of the defendant. (R. 1465). The contention is that this is a violation of right to be present for his due process right to be present guaranteed by the Fourteenth Amendment to the United States Constitution.

The argument advanced by the Appellant rests on dicta in United States ex rel. Negron v. New York, 434 F.2d 386 (2d Cir. 1970). There the defendant only had intermittent services of an interpreter. The Court specifically distinguished

cases presenting facts like this one. Id. at 391 n.9 the United States Supreme Court decision addressing the matter commits it to the discretion of the trial court. Perovich v. United States, 205 U.S. 86 (1907) the trial court did what it could do for the Appellant. The decision on the use of the interpreter was up to the Appellant. That he did not use the interpreter should not be allowed to upset his conviction at this late date. Cf. Pope v. State, infra.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS WHERE IT WAS ESTABLISHED THAT ASSISTANT STATE ATTORNEYS HAD CONDUCTED INTERVIEWS WITH APPELLANT WITHOUT NOTIFYING APPELLANT'S DEFENSE COUNSEL, THEREBY VIOLATING THE ETHICAL CANONS OF THE FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY.

(As Stated by Appellant).

Under this point, the Appellant argues that the trial court erred in not excluding the statements the Appellant gave to Assistant State Attorneys Delano Brock and Jerry Berry on the ground that they violated the constraints of Fla. Code Prof. Res. D.R. 7 - 104(A)(1). These statements were not introduced into evidence. They were, however, used during the State's cross-examination of the Appellant. The argument in support of reversal on this ground is that failure to suppress the statements will encourage contempt of the disciplinary rules. The State cannot agree that reversal and suppression of these statements is warranted.

There is no claim that the statements assuming, arguendo, their harmfulness to the Appellant, were coerced and are thereby excludable for the policy reasons that support the exclusion

of coerced statements from evidence either in the prosecution's case in chief or on rebuttal. Nor, is there a claim that the statements were taken in violation of the Appellant's constitutional right to counsel. The sole claim is that these statements were procured in violation of Fla. Code Prof. Res. D.R. 7 - 104 (A)(1).

There is no need to exclude this evidence on the ground that the method of obtaining it makes it unreliable. Nor, does this case a situation where the Court must resort to the use of an exclusionary rule to exert control over individuals it does not have the power to supervise. Here, the Court has the power to the attorneys conduct. Art. V, § 15 Fla. Const. Employment of the exclusionary rule here simply would not make sense. The effect would be to punish all the people when a narrower remedy is readily available. If the Court finds a violation and refers the matter and ultimately enters a sanction against the attorneys involved, it will achieve the deterrent effect that the Appellant's argument claims that it wants to achieve through the broader tool of an exclusionary rule.

ISSUE III

THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING CO-DEFENDANTS REYES AND SORY TO REFUSE TO TESTIFY ON GROUNDS OF SELF-INCRIMINATION WITHOUT FIRST DETERMINING THE EXTENT AND VALIDITY OF THEIR FIFTH AMENDMENT CLAIMS.

(As Stated by Appellant).

Under this point, the Appellant contends that the circuit court erred to his prejudice in that it did not reliably determine that the co-defendants Sory and Reyes would claim the privilege and that the claim was a valid one. The claim seems that the Court had to determine this information from the witnesses personally. The State cannot agree. The trial court acted properly in this regard. It was clear from the proffer by the Appellant's counsel that he wished to ask them a question that would have placed the witnesses at the crime scene with the Appellant. It is also clear that the Court reliably established that both co-defendants would claim the privilege. The assertion in the Appellant's argument to the contrary is simply without support in the record. To the extent that the claim is that the Court was under a duty to inquire of the witnesses personally, it is without support in the case law.

After the close of the State's case in chief, R. 1152 and after the Court denied the Appellant's Motion for Judgment of Acquittal and after some other preliminary matters not germane

to the issues presented by this appeal, counsel for the Appellant announced his purpose in calling co-defendants Sory and Reyes. He said:

> The purpose that I'd be calling Sory and Reyes to the stand is not for the purpose of having them invoke the Fifth Amendment, but to testify as to their recollection of the events at the scene where the automobile was stopped and the shooting occurred.
>
> And, in particular, I anticipate that their testimony would be to the effect that there was gunfire coming from the officers as well as from the automobile in which they stayed.
>
> (R. 1184, 1185).

After a comment by the prosecutor, counsel for the co-defendants, Mr. Monaco, announced to the Court, "We advised both Mr. Sory and Mr. Reyes to invoke their Fifth Amendment privileges under the Constitution and, therefore, not testify at this time. The Appellant's counsel then told the Court that he could accept the fact that Sory would invoke his rights under the Fifth Amendment but he wanted more inquiry of Mr. Reyes. (R. 1185). The Court then instructed one of their counsel, Mr. Faerber, to go to the holding cell and discuss the matter with Mr. Reyes.

(R. 1186). Faerber then advised the Court that Reyes would invoke the privilege. The Appellant's counsel then asked the Court to announce to the jury that the defense had called the witnesses but that they had refused to testify. (R. 1186). The State objected and the Court sustained the objection. (R. 1186). Counsel for the Appellant continued his argument about the nature of the privilege. (R. 1188). The State then responded to the Appellant's claim that their testimony would not incriminate them explaining that their testimony would place them at the crime scene thereby incriminating them in the crime with which they stood charged. (R. 1189).

The standard for measuring whether a witness is appropriately invoking the Fifth Amendment privilege was established in Hoffman v. United States, 341 U.S. 479 (1951). In that case, the Court ruled:

> To sustain the privilege, it need only be evident from the implication of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure might result.
>
> 341 U.S. at 486, 487.

See also United States v. Apfelbaum, 445 U.S. 115 (1980)(questions must pose real and substantial hazards of incrimination. The courts

of this state apply the same analysis in determining whether a witness is properly invoking the privilege. Lewis v. First Am. Bank of Palm Beach Cty., 405 So.2d 300 (Fla. 1st DCA 1981); Talavera v. State, 227 So.2d 493 (Fla. 2d DCA 1969)(using Hoffman language) quashed in part on other grounds State v. Talavera, 243 So.2d 595 (Fla. 1971). As pointed out earlier, the testimony would place the co-defendants at the crime scene and, therefore, form a link in the chain of evidence against them. The trial court properly found that they were invoking the privilege appropriately.

The Appellant's assertion that the trial court had the duty to inquire of the co-defendants personally is without support in the case law. None of the cases cited in his argument so hold. They do not even address such a suggestion. Your undersigned has not located any cases that either so hold or otherwise discuss the methods a trial court must employ in passing on the validity of as claim of Fifth Amendment privilege by a witness. The Appellant's trial counsel was satisfied that both co-defendants would invoke the privilege in response to his questions about their presence at the crime scene after the Court had Reye's counsel make inquiry of him. He confined his argument to the nature of the privilege. He should not now be heard to claim otherwise.

ISSUE IV

THE TRIAL COURT ERRED BY INSTRUCTING THE ADVISORY JURY ON AGGRAVATING CIRCUMSTANCES WHICH REFERRED TO THE SAME ASPECT OF APPELLANT'S CRIME, THEREBY ALLOWING THE JURY TO IMPROPERLY DOUBLE AGGRAVATING FACTORS DURING THEIR DELIBERATIONS ON THE PROPRIETY OF THE DEATH PENALTY IN THIS CASE.

(As Stated by Appellant).

Under this point, the Appellant claims that the circuit court erred to his prejudice by instructing the jury over his objection on the four following aggravating factors: commission of the crime for pecuniary gain, murder committed to avoid lawful arrest and murder committed to hinder law enforcement. The contention is that the first two and the second two each address the same concern and cannot be doubled in the weighing process. The specific contention is that this is violative of the teaching of Provence v. State, 337 So.2d 783, 786 (Fla. 1976). And, as such, it upsets the role the jury is accorded by this Court's decision in Tedder v. State, 322 So.2d 908 (Fla. 1975). While the argument does have some superficial appeal, it is fatally flawed. It rests on a false analogy. The role of the jury and the trial court differ significantly in the process of deciding whether death is the appropriate sanction for any given individual convicted of first- degree murder.

The jury instructions simply give the jurors a list of arguably relevant aggravating factors from which to choose in

making their assessment as to whether death is the proper sentence in light of the mitigating factors presented in the case. The judge on the other hand, must set out the factors the Court finds both in aggravation and in mitigation. In reviewing those decisions, it is fair to conclude that the Court assigned weight to each factor it finds to exist in its sentencing order. The same cannot be said of the jury. Accordingly, in Straight v. Wainwright, 422 So.2d 827, 830 (Fla. 1982), this Court rejected the contention that Straight's counsel on direct appeal from his death sentence had been ineffective for not arguing that the trial court erred in instructing the jury on all the statutory aggravating factors in the statute not just those that were arguably relevant to Straight's case. This Court reasoned that for the judge to limit the jury's consideration of the aggravating factors would have improperly invaded the province of the jury. Accordingly, if any party is aggrieved by the Court's action it is the State, not the Appellant. See also Hitchcock v. State, 432 So.2d 42, 44 n. 3 (Fla. 1983).

ISSUE V

THE TRIAL COURT ERRED BY SENTENCING ERNESTO SUAREZ TO DEATH BECAUSE THE PENALTY WEIGHING PROCESS INCLUDED INAPPLICABLE AGGRAVATING CIRCUMSTANCES AND EXCLUDED APPLICABLE MITIGATING CIRCUMSTANCES THEREBY RENDERING APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

(As Stated by Appellant).

The Appellant's brief treats five different allegations of sentencing error under this point in the brief. The Brief of Appellee will address the first three separately and the last two together as they are subject to a common defense.

Sub-Issue A

Under this point, the Appellant contends that the trial court erred in finding that the aggravating factor of knowingly creating a great risk of death to many persons. It is predicated on the assertion that the presence of only three individuals in addition to the victim in the line of fire. The Appellant rests this argument on this Court's decisions in Johnson v. State, 393 So.2d 1069 (Fla. 1980) and Kampf v. State, 371 So.2d 1007 (Fla. 1979). The argument is without merit.

The test for determining whether this factor has been established by the evidence is not the number of people present but whether the defendant's conduct is such that it creates a situation where it is reasonably forseeable that the conduct creates a great risk of death to many persons. The Court below was well aware of this Court's teaching in Kampf v. State, supra. It made reference to it in the sentencing order. The Court below correctly focused on this probability in determining that this aggravating factor existed.

This Court formulated applied the reasonably forseeable test for applying this aggravating factor in King v. State, 390 So.2d 315, 320 (Fla. 1980)(upholding a finding of knowingly creating a great risk of death to many persons on account of setting fire to a house in which only the murder victim was found). The Court has subsequently applied this test in a variety of circumstances. See e.g. Delap v. State, 440 So.2d 1242, 1256 (Fla. 1983)(applying reasonable foreseeability test to affirm finding of knowingly creating a great risk of death to many persons predicated on erratic driving on highway while struggling with victim) and Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981)(setting fire to building in which six elderly people resided sufficient to support finding of knowingly creating a great risk of death to many persons).

The Court below correctly applied this test to the facts of this case. Deputy Waller described the chase after the Appellant's vehicle. (R. 719 - 733). The Appellant's car had five individuals in it. (R. 725). And, after noticing that he was being followed by a marked vehicle, the Appellant sped up and ran a stop sign. (R. 724, 725). The Appellant accelerated at a high rate of speed and ran a rolling road block formed by a couple of patrol cars with their emergency lights on by running off the shoulder of the road. (R. 728, 729). There were other vehicles besides the Appellant's and the law enforcement vehicles using the road going in both directions. In fact, the Appellant had to pass vehicles in order to get around them. (R. 729, 730). The Appellant's driving ran other vehicles off the road and nearly caused head-on collisions. (R. 730). He also ran a red light. (R. 731). He was driving so fast that his vehicle was sliding and the deputy's vehicle had to slide with him. (R. 731). The Appellant finally made a left hand turn and slid to a stop in a driveway. As the deputy left his car, the Appellant opened fire on the four officers in the immediate vicinity. (R. 733). The Appellant endangered the lives of his four passengers, the occupants of the other vehicles who were forced to share the roads with him and the

lives of the deputies assigned to stop him. There is clearly substantial evidentiary support for the circuit court's conclusion that the Appellant knowingly created a great risk of death to many persons. Even a child could foresee that this was a natural and probable consequence of the Appellant's actions.

It is therefore plain that this case has far more in common with King, supra, Delap, supra and Welty, supra than it does with either Johnson, supra or Kampf, supra. The Appellant's behavior went far beyond shooting a semi-automatic rifle at four law enforcement officers in a very densely populated neighborhood. The Court below correctly concluded that "the facts and evidence of this case demonstrate that there was, indeed, a high probability or great likelihood of death to many persons created by the Defendant's actions." Sentencing Memorandum at 4. See A.4, Brief of Appellant.

Sub-Issue B

Under this subpoint, the Appellant's argument contends on the authority of Provence v. State, supra that the circuit court erred to his prejudice by finding two aggravating factors based on the same facts. The contention is that, "the court used the aspect of the Appellant's flight from arrest to establish both the aggravating factors of avoiding arrest and flight after committing a robbery." The argument is without merit. It rests on a faulty understanding of Provence and its progeny.

In Provence, this Court ruled that it is error to find two aggravating factors when they are both based on the same evidence and the same aspect of the defendant's crime. The Court went on to rule in that case that the circuit court should not have found both murder committed during the course of a robbery and murder committed for pecuniary gain. Recently this Court ruled in Mills v. State, Case No. 63,092 (Fla. Jan. 10, 1985) that evidence showing that the victim suffered great mental anguish awaiting the defendant's execution-style murder established both cold, calculated and premeditated and heinous, atrocious and cruel aggravating factors. Likewise,

in Squires v. State, 450 So.2d 208, 213 (Fla. 1984), this Court ruled that evidence establishing the defendant's status as an escapee and previous life felony convictions were separate and each supported the finding of an aggravating factor. That decision offers a particularly compelling analogy here. Here, the murder occurred as the Appellant was escaping from a robbery. And once he had been run to ground by the deputies, he murdered one of their number for the sole purpose of escaping arrest. Clearly, there was distinct proof as to each aggravating factor found by the circuit court. See Hill v. State, 422 So.2d 816, 819 (Fla. 1982)(finding no improper doubling when there was distinct proof as to each factor). There was no error here. This Court should affirm the circuit court over the doubling objection presented under this subpoint.

Sub-Issue C

Under this point, the Appellant contends that the trial court improperly found lack of remorse as a non-statutory aggravating circumstance and injected his personal beliefs and suppositions into the weighing process. The argument rests on this Court's decision in Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983). The point is totally without merit. There were three valid aggravating factors found in this case and no mitigating factors. Death was, presumptively, the correct sentnece. Where there are properly found aggravating factors and no mitigating factors, death is presumptively the correct sentence. Sireci v. State, 399 So.2d 964, 968 (Fla. 1981)(cert. denied 102 S.Ct. 2257, rehearing denied 102 S.Ct. 3500). See also Clark v. State, 379 So.2d 97 (Fla. 1980).

That the trial court noted a lack of remorse does not mean that it considered it in the weighing process. The trial court can express its opinions and philosophies about why the weighing process produced the correct result without risking reversal. Goode v. State, 410 So.2d 506, 508 - 509 (Fla. 1982); Vaught v. State, 410 So.2d 147, 151 (Fla. 1982).

See also Agan v. State, 445 So.2d 326 (Fla. 1983). There, the Court found mention of lack of remorse in the trial court's analysis of the mitigating factors argued to be present in the case not to be improper non-statutory aggravating factor. This case is no different. This Court should affirm the sentence over this objection. The State likewise rejects the claim that the trial court's observations about the Appellant were speculative and without foundation in the record. It is the State's position that these observations are simply a different, if somewhat more judgmental, characterization the testimony presented by Dr. Jose Lombillo. See R. 1410 - 1424.

Sub-Issues D & E

The final two arguments try to fault the trial court for not finding mitigating factors that the Appellant thought it should find. There was no error here because the Court considered all the evidence it had before it. That is the only requirement. A Court need not find a mitigating factor just because someone thinks that there was evidence that would justify such a finding. The circuit court did not commit any error in its findings of aggravating and mitigating circumstances. He contends that the trial court failed to find mitigating circumstances that the evidence might arguably support. The contentions are without merit. In Porter v. State, 429 So.2d 293 (Fla. 1983), this Court had occasion to address a very similar argument. This Court's analysis is just as apposite here. In addressing the contention, this Court said:

> There is no requirement that a court must find anything in mitigation. The only requirement is that the consideration of mitigating circumstances must not be limited to those listed in Section 921.141(6), Florida Statutes (1981). What Porter really complains about here is the weight the trial court accorded

> the evidence Porter presented in mitigation. However, "mere disagreement with the force to be given (mitigation evidence) is an insufficient basis for challenging a sentence. Quince v. State, 414 So.2d 185, 187 (Fla. 1982).
>
> 429 So.2d at 296.

This Court recently affirmed this principle in its decisions in Lusk v. State, 446 So.2d 1038 (Fla. 1984); White v. State, 446 So.2d 103 (Fla. 1984); Daugherty v. State, 419 So.2d 1067 (Fla. 1982) cert. denied 103 S.Ct. 1236 (1983); Riley v. State, 413 So.2d 1173 (Fla.) cert. denied, 103 S.Ct. 317 (1982). The Appellant's arguments grouped under this subpoint are without merit.

CONCLUSION

Based on the above and foregoing reasons, arguments, and case authorities, the Appellee respectfully submits this Honorable Court affirm the judgment and sentence of the lower court.

Respectfully submitted,

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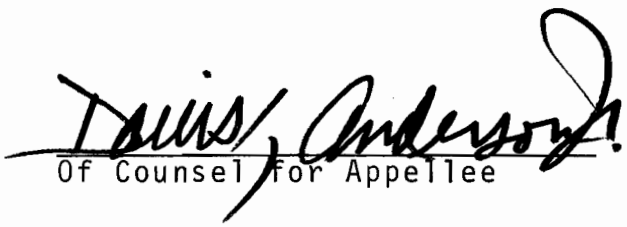
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Regular Mail to Gary R. Peterson, Assistant Public Defender, Hall of Justice Building, 455 North Broadway, Bartow, Florida 33830 on this 26th day of March, 1985.



Of Counsel for Appellee