IN THE SUPREME COURT OF FLORIDA

ANTHONY BERTOLOTTI,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,287

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
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ATTORNEY FOR APPELLANT

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IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE FROM HIS DWELLING.

The issue of the trial court's ruling on Appellant's motion to suppress was adequately presented to the trial court. At the hearing on the motion to suppress, defense counsel argued, among other grounds, that Sharon Griest had been essentially acting as a police agent when she signed the consent to search form for the Orlando Police Department. (R 1221) The fact that additional evidence on that point, i. e., the mention of "Crime Watch" in the testimony, was elicited at the trial should not invalidate the objection, which was timely renewed at trial. (R 938, 939, 962)

The fact that Appellant does not accuse Sharon Griest of hostility does not denature his argument that her motivation (as opposed to her motive) in consenting to the search was improper. Appellee cites Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), and its note that Coolidge's wife consented to the search of their home because of her desire to "clear" her husband. On the other hand, in Silva v. State, 344 So. 2d 559 (Fla. 1977), wherein Silva was present and protesting his paramour's consent to search his home, this Honorable Court discussed other courts' recognition of the consenting party's "motives" for consenting. Id., 344 So. 2d at 561. Appellant maintains that, if personal hostility between cohabitants can invalidate a consensual search, then certainly the intrusion of state action can.

"Crime Watch" is a "very well known program that most persons [presumably including the trial judge] in the area are aware of," which rewards police informants for information "that is later proved to be correct and useful." (R 1830, 911) Informants working for this program are police agents, and their actions should be considered police actions. Sharon Griest's "consent" under the circumstances amounted to no more than a police officer's authorization of a warrantless search where no exigent circumstances existed. The motion to suppress should have been granted.

POINT VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUESTED JURY INSTRUCTION AT THE PENALTY PHASE OF HIS TRIAL.

Chenault v. Stynchcombe, 581 F.2d 444 (5th Circ. 1978), dismissed a habeas corpus petition without prejudice because the petitioner had not exhausted state remedies before approaching the federal court. If the petition had been properly before the court, however, the judges felt that the defendant raised a valid contention that the penalty jury instructions given in his case had been inadequate, because

> We read Lockett and Bell, then, to mandate that the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death.

Id., 581 F.2d at 448; Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Bell v. Ohio, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978).

Although Appellee "cannot find anything in Chenault" to support Appellant's requested jury instruction, Appellant contends that Chenault is but one expression of his position that his jury should have been told that they had the option of recommending life in prison, even if they could find aggravating factors to support a sentence of death. The jury should not be led to believe that a recommendation of life in prison is appropriate only where the mitigating circumstances outweigh the aggravating, but this was the effect of the instructions actually given, and of the prosecutor's

argument on the sentence. (R 1455-1456)

Appellant's requested instruction is not, as Appellee contends, "directly contrary to this Court's holding" in Jackson v. Wainwright, 421 So. 2d 1385 (Fla. 1982). Jackson held only that appellate counsel had not been ineffective by not challenging a State v. Dixon instruction on direct appeal, because the instruction was "not improper." State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974). In contrast, Appellant's jury instruction issue has been preserved and argued and, Appellant respectfully contends, is due consideration because of the reasons expressed by Justice McDonald in his separate opinion in Randolph v. State, No. 54,869 (Fla. November 10, 1983)[8 FLW 446]. Justice McDonald feared that trial judges would take State v. Dixon to mean that death is presumed to be the proper penalty where aggravating circumstances are not overcome by mitigating circumstances. That presumption should be limited to this Honorable Court's role in reviewing sentences of death; certainly jurors should not be told or any in way led to believe that death is to be recommended whenever it can be legally supported. They should instead, as Appellant requested, be clearly told that theirs is the power to show mercy, within their discretion.

CONCLUSION

For the reasons expressed herein and in the initial brief, Appellant respectfully requests that this Honorable Court reverse his conviction and remand this cause to the trial court for a new trial. In the alternative, Appellant respectfully requests that this Honorable Court vacate his sentence of death and remand this cause to the trial court for imposition of life imprisonment.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, by delivery; and by mail to Mr. Anthony Bertolotti, P. O. Box 747, Starke, Florida 32091, this 4th day of December, 1984.

Brynn Newton

ATTORNEY