IN THE SUPREME COURT OF FLORIDA

ROBERT IRA PEEDE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,31[illegible]

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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	)	
Appellee.	)	
	)	

REPLY BRIEF OF APPELLANT

ARGUMENT

POINT I

REVERSIBLE ERROR OCCURRED WHERE A DEFENDANT, UPON REQUEST, WAS EXCUSED BY THE TRIAL JUDGE FROM ATTENDING CRITICAL STAGES OF HIS CAPITAL TRIAL AND WAS SUBSEQUENTLY SENTENCED TO DEATH, IN THAT HIS ABSENCE DENIED DUE PROCESS OF LAW REQUIRED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

The State repeatedly encourages this Court to apply the doctrine of harmless error[1/] because the evidence of "guilt" is overwhelming. The evidence that Mr. Peede is guilty of killing his wife is indeed overwhelming, but that does not equate with overwhelming evidence of guilt of first-degree murder.

1/ Black's Law Dictionary defines "harmless error" as "[a]n error which is trivial or found or merely academic and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." Id. at 646. See also, §§59.041, 924.33, Fla.Stat. (1983).

It is not now nor has it ever been Mr. Peede's contention that he did not kill his wife. He admitted guilt when he was arrested and transported to Florida (R 692-694, 710-711, 714-723). When those statements were sought to be suppressed by his trial attorneys, Mr. Peede objected and ratified the validity and veracity of his confession(s)[2/] (R 323-327). Quite obviously Mr. Peede could have dispensed[3/] with a jury trial or simply pled guilty to first-degree murder. He did neither.

Instead, he exercised his fundamental right to have twelve impartial jurors, as the voice of his peers, pronounce what crime he committed.

Mr. Peede was and remains constitutionally entitled to the full panoply of protections designed into a jury trial, not the least of which is the defendant's presence during trial. The presence of an accused is so important that it justifies having the obstreperous defendant exhibited bound and gagged in the courtroom when necessary.[4/] The jury process is fatally tainted when the trial is unnecessarily conducted in the defendant's absence, and it is an unnecessary absence when a defendant is excused from attending his murder trial simply because he does not want to be there.

2/ Mr. Peede stated, "Your Honor, not trying to pull the wool over nobody's eyes. My Miranda Rights were read to me." (R 325); "I'm not contesting anything that I said.... Your Honor, not trying to cause the Court any hard time or anything. What I've said is the truth to the best of my knowledge." (R 326).

3/ "A defendant may in writing waive a jury trial with the consent of the State." Fla.R.Crim.P. 3.260 (emphasis added).

4/ Cf. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

Specifically, not only is the defendant accountable to society [the jury] for his actions, but so too is the jury, the judge, the attorneys and each and every witness accountable to the defendant throughout the trail as an integral part of justice in American courts.

The State argues that the "excused" absence of Mr. Peede is viewed by the undersigned appellate counsel as fundamental error, whereas the trial court and trial attorneys viewed Mr. Peede's non-attendance as the exercise of his "right" not to be present. (AB at 2, 7, R 678-679). In reply, the undersigned attorney respectfully submits that the Honorable Judge Cycmanick and trial attorneys are incorrect in believing that a defendant has some "right" not to be present at trial. If such a right exists, how can a defendant be convicted for failing to appear for trial when the right is exercised? cf. Howard v. State, 9 FLW 2248 (Fla. 2d DCA October 24, 1984).

The State's reliance on Fla.R.Crim.P. 3.180(b) to "clearly" provide the defendant "a right in this state to voluntarily absent himself from any portion of the trial if he is present at the beginning" (AB at 8) is misguided and wholly contrary to the State's position in Howard, supra. Apparently the State views the rule authorizing the trial to continue to conclusion when a defendant "voluntarily absents himself from the presence of the court without leave of court"[5/] as conferring upon a defendant of a felony/capital trial the right to excuse himself from attending the trial if he initially shows up. Rule

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5/ Fla.R.Crim.P. 3.180(b), (emphasis added).

3.180(b), however neither explicitly nor implicitly establishes such a right upon felony/capital defendants. Rather, it is evident that if a defendant in a capital/felony trial voluntarily leaves during trial, the trial may properly continue. If a defendant in a misdemeanor trial absents himself from trial with or without permission from the court, the trial may also properly continue. Otherwise, why would the Florida legislature provide a separate, specific rule to excuse a misdemeanant from trial[6/] if such authority was already provided in Rule 3.180(b)? If the State's contention is accepted, then a new issue is created. Does a trial judge abuse his discretion in denying a defendant's request to be absent from trial once it has started if all the defendant is doing is exercising his right not to be present? See Howard v. State, supra.

WAIVER

The State was challenged to direct this Court's attention to an adequate waiver by Mr. Peede of specifically identified fundamental rights[7/], and in response the State ("with no difficulty") points solely to a purported waiver of the right to be present at trial (AB at 10). Appellant submits that such a generic waiver cannot suffice in light of the confusion concerning the right to counsel that affirmatively appears in this record on appeal.

6/ Fla.R.Crim.P. 3.180(c) provides, "Persons prosecuted for misdemeanors, may, at their own request, by leave of court, be excused from attendance at any or all of the proceedings aforesaid. (emphasis added).

7/ Page 15 of Initial Brief of Appellant.

Mr. Peede could not control his court appointed attorneys and when he respectfully informed the Court that they were not following his directions, he was summarily ejected from the courtroom. "Assistance of counsel" had ceased being a right and instead became a nightmare. Assuming, arguendo, that a defendant in a capital case can waive his presence during the jury trial, such a waiver is invalid where, as here, it was induced by the unexplained actions of his appointed counsel. The defense that was being presented was not Mr. Peede's, but instead was that of the defense attorneys'. Why in the world would a defendant have to be competent to stand trial if his efforts to assist in his own defense are meaningless?

Stated more simply, because there is a question of record concerning the cooperation being given by counsel to the defendant, a full and complete inquiry by the Court concerning Mr. Peede's satisfaction with his counsel should have been conducted prior to acceptance of his request not to be present. Mr. Peede's statement that, "they've [the defense attorneys] started the trial, they should finish it." (R 673) will not suffice. It was not the defense attorneys' trial... it was Mr. Peede's. A new trial is required.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BY FORCING COURT APPOINTED COUNSEL UPON A DEFENDANT WHO DESIRED TO REPRESENT HIMSELF.

The State argues that Mr. Peede did not unequivocally assert his right to represent himself (AB 12-13), and states that the judge was of the impression that Mr. Peede did not really wish to conduct his own defense (AB 14). The State concludes that, "because at voir dire prior to trial the Appellant made it clear that he did not wish to represent himself," his prior request had been equivocal (AB at 15).

The conclusion made by the State overlooks that Mr. Peede tried to exert his right to a speedy trial, stating clearly that he would prefer his right to a speedy trial over his right to assistance of counsel (R 1431, 1438). The trial judge ruled that Mr. Peede did "not have the intellectual and legal ability to represent [himself]" (R 1439), and the trial was continued. It is absurd to now suggest that Mr. Peede did not then unequivocally request to represent himself in order to obtain a speedy trial because several months later he accepted the services of that counsel at trial. Plainly stated, the court said, "you cannot represent yourself and you cannot get a speedy trial because counsel needs more time to prepare." At trial, the Court says, "O.K., counsel is prepared for trial now... do you still want him?"

At the motion to withdraw hearing the trial court ruled that Mr. Peede was unable [without the legal and intellectual ability] to represent himself, notwithstanding that he advanced two bona fide reasons to do so[8/]. It would thereafter be but a useless act to continually voice dissension about his appointed counsel when only one of the two reasons remained. His right to a speedy trial was gone. Of course he would accept assistance of counsel at trial so long as he was able to participate in his own defense. And when the attorneys refused to follow Mr. Peede's directions, and he objected, he was summarily expelled from his trial. Because his attorneys continued to disregard his requests and because the judge was totally unresponsive to his requests for assistance from the bench, there was nothing left for Mr. Peede to do but return to his cell and wait for the ultimate word.

8/ a) receiving a speedy trial/avoiding a continuance.
b) avoiding presentation of certain evidence in mitigation (R 1438-1439).

POINT III

THE TRIAL COURT DENIED APPELLANT DUE PROCESS OF LAW AND THE RIGHT TO A JURY TRIAL GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BY UNREASONABLY LIMITING THE TIME ALLOWED FOR CLOSING ARGUMENT TO 30 MINUTES PER SIDE IN A CAPITAL TRIAL.

The record contains a request by defense counsel for more expansive time for argument, that he not be limited strictly to 30 minutes (R 858). The Court replied to think in terms of using 20 to 30 minutes, and ruled, "If you exceed 30 minutes, I'll, you'll hear that, I'll bump into the mike accidentally and let you know." (R 858).

The record thus contains a request for more time, followed by a ruling by the judge. Any further objection or argument would have been superfluous and a useless act. The matter is sufficiently [if minimally] preserved for appellate review. [See Foster v. State, 9 FLW 2387 (Fla. 3d DCA November 15, 1984)].

The closing argument was the defense presented by Appellant's attorneys. The severe limitation on time was a severe limitation on the presentation of that defense, and it constituted a clear abuse of discretion in a capital trial for the judge to confine closing arguments to 20 to 30 minutes. The matter must be reversed.

POINT IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, BY PERMITTING HEARSAY TESTIMONY OVER OBJECTION TO THE PREJUDICE OF THE DEFENDANT.

The State argues that two of the statements here at issue came in without hearsay objections (AB at 22). The record indicates, however, that at the very inception of this line of questioning by the prosecutor, defense counsel lodged two hearsay objections that were improperly overruled (R 598-599). It is clear that further objection on hearsay grounds was futile, because the trial court was allowing the hearsay testimony to establish the declarant's [Darla Peede's] state of mind pursuant to §90.803(3)(2), Fla.Stat. (1983).

However, contrary to the State's assertion, Darla Peede's state of mind at the time she voluntarily went alone to pick up her husband at the airport was wholly irrelevant, and such testimony was extremely prejudicial. The State has offered no justification for the daughter's testimony alleging that her mother had told her [the daughter] that Appellant had stated that he would kill Calvin Wagner and Geraldine in North Carolina on Easter (R 598-600). The testimony was hearsay, extremely prejudicial and improperly admitted, causing reversible error.

POINT VII

AS APPLIED, SECTION 921.141, FLORIDA STATUTES VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY DENYING A DEFENDANT DUE PROCESS OF LAW, IN THAT HE EXISTENCE OF AGGRAVATING AND/OR MITIGATING CIRCUMSTANCES, AS QUESTIONS OF FACT, ARE FOUND BY THE TRIAL JUDGE AS OPPOSED TO A JURY OF THE DEFENDANT'S PEERS.

The State argues, "The Appellant presents absolutely no statutory, constitutional, or decisional authority for his assertion that this sentencing procedure violates any specific constitutional proscription." (AB at 33). Appellant's contention is concisely addressed in State v. Overfelt, 9 FLW 444 (Fla. Oct 18, 1984), wherein this Court held that a trial court cannot enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm absent a factual finding by the jury that a firearm was used by the defendant while committing the crime. This Court stated:

> ...The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode.

Overfelt, Id. (Emphasis added).

The State's protestations of lack of preservation for appellate review are without merit. The burden is upon the State to secure the appropriate findings from the jury, not defense counsel. The instant matter must be vacated.

CONCLUSION

BASED UPON the argument and authority contained herein, and in the Initial Brief, this Court is respectfully requested for the following relief:

In reference to Points I-V - To reverse the conviction and remand the matter for retrial.

In reference to Points VI-IX - To vacate the sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida and Mr. Robert Ira Peede, Inmate No. 093094, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 4th day of December, 1984.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER