IN THE FLORIDA SUPREME COURT

ROBERT GLOCK,

Appellant,

v. CASE NO. 65,380

STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Robert Glock and a co-defendant Carl Puiatti were charged by indictment with the first degree murder of Sharilyn Richie, with her kidnapping and robbery of Mrs. Richie. (R 15) Appellant filed a motion to suppress statement (R 171 - 174) and a motion to suppress tangible evidence. (R 182 - 185) Appellant also filed a motion seeking a severance of his trial from that of co-defendant Glock; he contended that there were material differences in the statements of the two defendants and a great likelihood of antagonistic defenses between them. (R 167 - 169) The motion to sever was denied (R 178 - 180) as was the motion to suppress. (R 208)

At the hearing on severance held on March 2, 1984, co defendant Glock argued that Puiatti had given statements implicating Glock, that there were conflicts in the statements and that he didn't know Puiatti's theory of defense. (R 340 - 345) The state argued that possible antagonistic defenses did not suffice to require a severance and that there were only minor differences in the accounts. (R 349 - 353) At that time, Puiatti had decided not to file a motion for severance. (R 353) Ten days later, Puiatti apparently changed his mind and filed a written motion for severance and after further argument the court denied the motion. (R 760 - 766)

At the motion to suppress hearing, Trooper Moore testified that on August 20, 1983 he stopped a Toyota on the New Jersey highway. The license plate was not legible and New Jersey law requires a proper display of tags. (R 398 - 399) Glock was driving the vehicle and Puiatti was slouched over on the passenger seat. (R 399)

Glock and Puiatti both informed the officer they had only suspended licenses and when he looked in the glove compartment to get the vehicle registration, Moore observed the presence of a gun in the glove box. Glock said the car belonged to his brother-in-law Mr. Ritchie. (R 401 - 403) Glock said he did not mind if the officer looked in the car and informed Moore there was a gun in the car. Moore retrieved a .38 revolver and a .22 Derringer in the glove box. It is against the law in New Jersey to carry a handgun without a permit. (R 403 - 405) Moore arrested the two defendants for possession of the guns. (R 406) Under that state law a firearm found in a vehicle occupied by more than one person is presumed to be in the possession of all. (R 193) Glock claimed the guns belonged to his brother-in-law. (R 405) The two defendants were handcuffed and placed in the police car. A search of the Toyota revealed a wallet with identification from South Carolina which appeared to be someone other than Glock and Puiatti. Also some pawn tickets were discovered. (R 407 - 409) Moore gave the two men Miranda warnings but did not question them. Glock asked the trooper to charge only himself. (R 488 - 489) At the station the two defendants were again advised of their rights and signed the forms. An NCIC check of the vehicle led to the discovery that the vehicle was stolen and the owner a homicide victim. (R 410 - 412) No promises or threats were made and neither man requested a lawyer. (R 413 - 416) When Moore asked what was the story concerning the car, Puiatti told Glock, "You better tell him." Glock then stated they had stolen the car.

Detective Sergeant John Quinlan participated in the homicide

investigation in New Jersey. He observed the papers showing the vehicle registered to the Ritchie family and the wallet with an ID from a Mr. Nelson from South Carolina along with the two guns and pawn shop tickets. (R 449 - 451) Quinlan interviewed Glock and the latter admitted abducting the woman at knifepoint from a shopping center and stealing her car. Quinlan then interviewed Puiatti and asked him about the car. Puiatti responded that Glock picked him up and asked if he wanted to go to New York. Puiatti said he wasn't sure but thought the car might be stolen. (R 455 - 458)

Complaints against the two defendants were typed charging them with possession of stolen weapons and a stolen vehicle. (R 459) The municipal court remanded them to the county jail with no bond because of the possible homicide involved. (R 459 - 460) Detectives Stahl and Wiggins of Pasco County subsequently arrived, the defendants were readvised of their rights and no promises or threats were made. Glock gave a statement and Puiatti repeated his initial story of being picked up by Glock but when told that Glock had given a statement regarding the Ritchie murder, Puiatti conceded that he might as well tell them and discussed the murder. (R 542 - 549) Thereafter, both signed a consent form to search the car. (R 472 - 473)

Upon arrival in Florida Stahl went to the Townsend Road grove with the defendants to look for expended cartridges. Glock and Puiatti also agreed to give a joint statement with a court reporter present. (R 524 - 526) They didn't want to see a Public Defender. (R 540)

Detective James Wiggins testiifed that on August 24, 1983,

Assistant Public Defender Norgard wanted to talk to the defendants and Wiggins told him that neither had requested a lawyer. (R 570) Wiggins told Glock that Norgard was a lawyer and they could talk to him. Glock and Puiatti told Wiggins they did not wish a lawyer and if they wanted one, they'd call one tomorrow. (R 571)

Assistant Public Defender Norgard testified and admitted that Puiatti and Glock didn't want to talk to him that evening. (R 609)

Puiatti testified at the suppression hearing; he admitted that no one told him his statements would keep him out of the electric chair (R 636) and he conceded that he did not ask any of the detectives to see a lawyer. (R 639 - 641) He understood his rights at each warning and agreed that he declined the opportunity to talk to lawyer Norgard. (R 640 - 641)

Glock testified that he was aware of his rights (R 658) and that he did not make a request for an attorney to the detectives. (R 660) He too declined to talk to Assistant Public Defender Norgard. (R 662)

The trial court denied the motion to suppress finding Appellant had no standing to challenge the search of the stolen vehicle, finding the stop by the New Jersey officer to be reasonable and the confessions to be voluntary. The court commented that Appellant had not presented to law enforcement authorities or any court a request for an attorney. There were not improper inducements. (R 703 - 707)

At trial, the prosecution presented evidence describing the discovery of the victim's body in an orange grove. (R 1661 - 1710) A pocketbook was discovered about sixty feet away from the victim

and a baseball mitt was clutched in her arms. (R 1686, 1688) Medical Examiner Joan Wood performed the autopsy which revealed multiple gunshot wounds. (R 1716) There was a bullet entering the left front chest (R 1718 - 1719), a bullet wound to the right breast (R 1719) and other bullet wounds to the extremities. (R 1719 - 1720) The victim was alive when all the bullets were fired into her. (R 1722) A firearms examiner opined that the gun was fired more than two feet from the victim's blouse. (R 1749) The victim's husband identified rings belonging to his wife. (R 1758) The rings were recovered at the Ocala pawn shop. (R 1765) Tom Profont who knew the Ritchies identified a C.B. radio he loaned to them and installed on their car. (R 1844)

Trooper Moore reiterated his suppression hearing testimony. (R 1769 - 1792). Detective Sergeant Quinlan reiterated his suppression hearing testimony. (R 1793 - 1814)

Detective Stahl testified concerning his observations at the murder scene. (R 1818 - 1828) Additionally, after advising Appellant of his rights on August 21, Glock gave a taped statement. (R 1830 - 1831) This tape (Exhibit 41) was played to the jury and the court instructed the jury to consider its admissibility only as to Glock, not as to Puiatti. (R 1835 - 1836) Similarly, Puiatti's tape recorded confession, Exhibit 42, was played to the jury with an instruction that the jury not consider the tape as evidence against Glock. (R 1841) Glock's and Puiatti's written statements (Exhibits 43 and 44) were introduced. (R 1845 - 1850)

The two defendants identified the .38 gun (R 1850), Glock identified the checkbook he had observed in the Ritchie pocketbook and

the victim's shopping list (R 1851), both identified her purse. (R 1852) Another statement was taken from Glock and Puiatti on August 24, in the presence of court reporter Sharon Baumgartner. (R 1853)

Stahl further testified that from the statements taken in New Jersey, Puiatti was driving the car at the time of the shooting and that Puiatti fired the first shot in the chest area. (R 1858 - 1861) Glock said it was Puiatti's idea to kill Ritchie. (R 1865) Puiatti said it was Glock's idea to kill the victim. (R 1865) In the statement to the court reporter Glock agreed that it was his idea and Puiatti went along with it afer he kicked it around. (R 1866) According to Glock, Puiatti shot the first and third times and Glock fired the second time. Puiatti asserted that he shot the first two times and Glock finished her off with a third shot. (R 1867)

Pawnshop owner Nathaniel Russ identified a pawn ticket issued August 19, 1983 to Glock for a C.B. and antenna. (R 1887 - 1888)

Deputy court reporter Sharon Baumgartner on August 24, 1983 by tape recording and stenograph machine recorded statements of Glock and Puiatti. (R 1898) In that August 24 statement, Puiatti acknowledged he was cognizant of his rights (R 1907), did not mind giving the statement (R 1910), admitted looking for someone to steal their car (R 1911), and assisted Glock in the kidnapping of the victim. (R 1912) Appellant explained that she offered to make a blank withdrawal (R 1913) and that afterwards they drove to an orange grove, let her out of the car after taking her rings (R 1914) and the two men started to drive off. (R 1915) Glock suggested that they shoot her, and after going back and forth a little bit Puiatti

agreed and turned the car around. (R 1915) They drove up next to her and Puiatti shot her in the right shoulder and drove off. (R 1915) As they drove off Glock noticed she was still standing. (R 1916) Puiatti maintained he shot her twice, once in the shoulder and once in the chest. (R 1917) They returned a second and third time and after Glock's final shot the victim fell. (R 1918) Puiatti added that they pawned the rings in Ocala (R 1919), pawned the C.B. in South Carolina (R 1921) and were stopped in New Jersey. (R 1922) Puiatti noted that no promises were made to him (R 1927) - no deal was made. (R 1928) They confirmed that he didn't want to see the public defender in Florida. (R 1929) No one refused to let him see a lawyer. (R 1930) Puiatti and Glock agreed with their statements. (R 1933).

The jury returned guilty verdicts on all three counts. (R 268 - 270; R 2105 - 2106)

At the penalty phase, appellant submitted the testimony of Glock's stepmother. (R 2230 - 2238) and of his sister, Tammy Yonce. (R 2271 - 2278) Glock testified that he felt remorse and had no prior convictions. (R 2280) Dr. Gerald Mussenden opined that Glock did not have a criminal profile (R 2258) but when told the facts of the case in a hypothetical question on cross-examination, Mussenden admitted those were not the facts furnished to him (R 2262 - 2263) and was contradictory to his assessment.

The jury recommended a sentence of death (R 271) and the trial judge concurred as explained in greater detail in his written findings. (R 301 - 311)

SUMMARY OF THE ARGUMENT

I. The lower court did not err in denying a severance at the penalty phase as there was no confusing or improper evidence submitted to the jury and the appellant had the opportunity to confront and cross-examine fully the witnesses. Additionally the two defendants did not argue to the jury that each defendant was under the substantial domination of another. The testimony would not have supported such a finding.

II. No error was committed in the trial court's instructing the jury and receiving their recommendation on a Sunday. Rule 3.540, Rules of Criminal Procedure. Moreover, appellant's failure to object below precludes consideration for the first time in the appellate court.

III. The lower court did not err in its refusal to impanel two juries. The Grigsby issue has been rejected by this Court in Caruthers v. State, __ So.2d __ 10 F.L.W. 114 and other federal appellate courts.

IV. The lower court correctly found that the homicide was committed in a cold, calculated and premeditated manner. The murderers were methodic in their continued return and pursuit of the victim until death ensued.

V. The lower court correctly declined to find appellant's confession and potential for rehabilitation as mitigating factors. Appellant merely is disagreeing with the weight the trial court attributed to the evidence.

POINT I

WHETHER THE LOWER COURT ERRED REVERSIBLY IN DENYING A SEVERANCE WHERE ALLEGEDLY EACH DEFENDANT AT THE PENALTY PHASE PRESENTED EVIDENCE OF SUBSTANTIAL DOMINATION BY ANOTHER.

ARGUMENT

Appellant argues that the court below erred reversibly in failing to grant a severance at the penalty phase of the trial because each defendant allegedly presented evidence that he was under the substantial domination of another. Hostility among defendants nor attempting to shift the blame from one defendant to another does not suffice for the granting of a severance. McCray v. State, 416 So.2d 804 (Fla. 1982) Repeatedly, this court has held:

> "The object of the [severance] rule is not to provide defendants with an absolute right, upon request, to separate trials when they blame each other for the crime. Rat her, the rule is designed to assure a fair determination of each defendant's guilt or innocence. This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. The rule allows the trial court, in its discretion, to grant severance when the jury could be confused or improperly influenced by evidence which applies to only one of several defendants."

McCray, supra, at 806; O'Callaghan v. State, 429 So.2d 691, at 695 (Fla. 1983). There was no confusing or improper evidence submitted to the jury and appellant had the opportunity to confront and cross-examine fully the witnesses.

A review of the penalty phase of the trial would be helpful.

Dr. Delbeato testified at the penalty phase for co-defendant Puiatti. (R 2143) A psychologist Delbeato opined that Puiatti had an emotionally unstable syndrome, an alleged inability to sometimes deal with stress. (R 2158) There was a dysfunction to the right hemisphere of the brain although his memory and information recall were normal. (R 2159) The dysfunction would affect his susceptibility to manipulation by another person. (R 2170) He believed anybody would be under stress to perform such a crime and Puiatti would have been more easily dominated by another individual. (R 2172) Most people are more easily influenced when under stress, Delbeato never examined appellant Glock and there would be a relationship between a person who influences another and the influenced person. (R 2178) Puiatti's state of mind was such that it was possible he could have been influenced and the witness could not answer yes or no that Puiatti was under the substantial domination of another person. (R 2216 - 2217)

Testifying for appellant Glock, psychologist Mussenden opined that Glock is somewhat easily influenced and could certainly be exploited (R 2250) and not as prone to be as destructive towards others. (R 2258) The two defendants may have been able to support each other because of their deficiencies. (R 2261) The facts of the crime had not been related to Mussenden. (R 2262 - 2263) His prior opinion was a contradiction to the facts of the case. (R 2263) Mussenden never examined Puiatti. (R 2270)

Testifying for Puiatti, Dr. Meadows described the possibility of brain damage (R 2328, 2330, 2332, 2335) and opined that Puiatti was under the substantial domination of another person. (R 2346)

Meadows had not seen any psychological testing of Glock. (R 2349)

In argument to the jury at the penalty phase, Glock argued not that there was substantial domination of Glock but the mixing of the defendants' personalities was a mitigating factor. (R 2414 - 2415) Puiatti did not even argue the alleged presence of the mitigating factor of substantial domination by another. (R 2422 - 2441) Again at the subsequent sentencing hearing Puiatti did not argue substantial domination of another as a present mitigating factor. (R 2589 - 2600)

Thus, the record clearly demonstrates the absence of merit to Glock's contention. Neither Glock (R 2414 - 2415) nor Puiatti (R 2422 - 2444) attempted to have the jury believe that he was under the substantial domination of another (although Glock did argue that the mixing of the two personalites should be deemed a mitigating factor) It is understandable that the argument was not advanced based on the paucity of supporting evidence. Dr. Delbeato, for Puiatti, could not answer yes or no that Puiatti was under the substantial domination of another person. (R 2216 - 2217) and Dr. Meadows had not done any psychological testing of Glock. (R 2349) On behalf of Glock, Dr. Mussenden's testimony was considerably shaken by his admission that the facts of the case had not been related to him and his concession that his prior expressed opinion was a contradiction to the facts of the case. (R 2263)

The jury was not unduly confused and could attribute the appropriate value to the testimony submitted by each defendant.

Glock suggests that there has been a violation of Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476. We ask how. Bruton

dealt with the admissibility of a confession of a co-defendant implicating the defendant where the confessor did not testify. Since there was no way to cross-examine the one who confessed and implicated the other resulting in a devastating impact on the jury the evidence was inadmissible. In the instant case, each expert was subject to cross-examination to explain the bases for their opinions. If appellant is complaining that no expert examined both defendants and that such testimony was weak, that certainly did not inhibit him from utilizing the testimony of Dr. Mussenden who did not examine co-defendant Puiatti. (R 2270) Under Glock's analysis, even had there been a severance, Mussenden's testimony would be diminished by the fact that he had examined only Glock and not Puiatti. The fact remains that to a more than adequate extent each expert was fully subject to cross-examination as to the basis for his opinion. There simply is no Bruton problem.

POINT II

WHETHER REVERSIBLE ERROR APPEARS IN THE TRIAL COURT'S INSTRUCTING THE JURY ON THE PENALTY PHASE AND RECEIVING THEIR RECOMMENDATION ON A SUNDAY.

ARGUMENT

First of all, appellant cannot complain of this issue initially on appeal since there was no objecton below to the proceedings on Sunday. (R 2385 - 2459) Ergo, the issue has not been preserved for appellate review. See Rule 3.570 Rules of Criminal Procedure.

Secondly, even if properly preserved, the point is meritless. While a judgment and sentence entered on a Sunday may be void - Higginbotham v. State, 101 So. 233 (1924) - a verdict may be rendered by a jury and additional or corrective instructions may be given on any day including Sunday. Rule 3.540, Rules of Criminal Procedure. Hodge v. State, 10 So. 556 (1892); 49 Fla. Jur. 2d, Sundays and Holidays, §10.

Since the judgment and sentence was not imposed on a Sunday, (R 285 - 290) no reversible error appears in the court's penalty phase instructions and receipt of the jury's penalty recommendation on that date.

ISSUE III

WHETHER THE EXCLUSION OF PROSPECTIVE JURORS OPPOSED TO THE DEATH PENALTY WAS ERROR.

ARGUMENT

The lower court did not err in refusing to impanel two juries. Appellant's reliance Grigsby v. Mabry, __ F.2d __ is to no avail as Grigsby has been rejected. See Wainwright v. Witt, __ U.S. __, __ L.Ed.2d 841 Witt v. Wainwright, __ U.S. __, 36 Cr.L. 4227; Caruthers v. State, __ So.2d __, 10 F.L.W. 114; Copeland v. State, 457 So.2d 1012 (Fla. 1984) Gafford v. State, 387 So2d 333 (Fla. 1980); Witt v. State, __ So.2d __, 10 F.L.W. 148. See also, McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985); Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1980); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Keeton v. Garrison, 742 F.2d 129 (4th Cir. 1984); Witt v. Wainwright, 755 F.2d 1396 (11th Cir. 1985)

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD CALCULATED AND PREMEDITATED MANNER.

ARGUMENT

The lower court supported this finding with the observation that according to their statements the two defendants calmly discussed killing Mrs. Richie; that after determining that killing was appropriate, Puiatti turned the car around, drove up to victim Richie, shot her and drove on. The defendants watched her carefully; when she did not fall down Puiatti turned the car around and again drove by the victim, shooting her and driving by. They again watched Mrs. Richie carefully and when she again did not fall down Appellant again turned the car around and again drove by Mrs. Richie. This time co-defendant Glock took the firearm from Puiatti and shot Mrs. Richie. The victim fell and the two defendants, satisfied she was dead, drove north in her stolen automobile. Not only was there a cold and premeditated decision to murder, but they kept returning to shoot her again when initial efforts appeared to have failed. The defendants did not attempt to rationalize that the victim had wronged them, failed to accede to their demands or for any reason deserved to be killed. There was no pretense of moral or legal justification; they simply reasoned she could not identify them if she died, but could if she lived. (R 303)

Appellant does not challenge these findings by the trial court; instead he argues that the statutory factor of cold, calculated and premeditated murder without moral jusfification is not demonstrated because the homicide was not planned long in advance. But

Appellant's interpretation is too limited. While the length of time of initially planning the homicide is significant, so also is the length and breadth of the conduct in effectuating it. As stated in Preston v. State, 444 So.2d 939 at 946 (Fla. 1984):

> "This aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator.
>
> (emphasis supplied)

This Court has upheld this aggravating factor where the killer has stalked his victim pursuing him into underbrushes to accomplish his mission. See Mills v. State, __ So.2d __, 10 F.L.W. 45.

The instant case is no different. When Appellant and his companion decided to kill their kidnap victim, they drove back and shot her; they watched and when she did not collapse they turned the car around, returned and shot her again; and yet on a third occasion, Puiatti returned to have Glock fire the third volley into the victim. Such a cold, calculated, ruthless homicide far exceeded the "normal" premeditation. See also Middleton v. State, 426 So.2d 548 (Fla. 19820 (defendant confessed he sat with a shotgun in his hands for an hour looking at the victim as she slept and thinking about killing her); Davis v. State, __ So.2d __, 9 F.L.W. 430 (defendant entered home armed with a pistol and rope used to bind one of the victims); Stano v. State, __ So.2d __, 9 F.L.W. 475 (cold and calculating finding upheld where defendant drove to isolated areas and after ordering victims to leave the car strangled one and shot the other); Troedel v. State, __ So.2d __, 9 F.L.W. 511 (cold and calculated finding upheld where the defendant wielded one of the

murder weapons and shared in the premeditated intent to kill two victims according to a pre-arranged plan); Johnson v. State, __ So.2d __, 10 F.L.W. 123 (when victim escaped from car, defendant chased her, caught her again and had to resume strangulation three times to make sure she was dead); Burr v. State, __ So.2d __, 10 F.L.W. 126 (defendant shot victim at a convenience store); Smith v. State, 424 So.d 726 (factor found in a rape-murder); Clark v. State, 443 So.2d 973 (5(i) found in the shooting of a defenseless elderly woman); Card v. State, 453 So.2d 17 (ample time for reflection as to the consequences found in the murder of the victim at the secluded area); Kennedy v. State, 455 So.d 351 (5(i) found in a killing following a brief gun battle); Thomas v. State, 456 So2.d 454 (factor found when victim brutally beaten to death).

Appellee notes that the trial judge found the existence of aggravating factors 921.141(5)(e) - a murder to avoid or prevent a lawful arrest (see Fitzpatrick v. State, 437 So.2d 1072; Lightbourne v. State, 438 So.2d 380), 5(f) capital felony committed for pecuniary gain, neither of which Appellant challenges. Additionally, the trial judge declined to find aggravating factors 5(a) homicide committed in the commission of a robbery or kidnapping and 5(b) the murder was especially heinous, atrocious or cruel only because it perceived the facts supporting these factors were used to determine the other found factors in aggravation (R 303 - 304)

In light of the multiple factors in aggravation, this court should affirm.

POINT V

WHETHER THE LOWER COURT ERRED IN NOT FINDING THE DEFENDANT'S CONFESSIONS AND HIS POTENTIAL FOR REHABILITATION AS MITIGATING CIRCUMSTANCES.

ARGUMENT

No argument can be advanced that the trial court did not consider the confessions and the potential for rehabilitation; the order reflects the court's consideration of it. (R 307 - 308)

> "Both defendants argued that this court should consider their confessions as a non-statutory factor. This request was troubling to this court. Those confessions probably did make this case easier to prosecute . . .
>
> . . . This court is convinced that both of these defendants hoped they would be spared a death sentence by confessing . . .
>
> . . . This court must admit that it did weigh the fact of the confessions favorable to the defendants in reaching its judgment to sentence these defendants to death, but does not believe their confessions should be counted as a mitigating factor.
>
> There was expert testimony indicating that both of these defendants were capable of rehabilitation. This court also considered this factor in the defendants' favor, but again does not believe it should rise to the level of a mitigating factor."

Essentially, appellant disagrees with the weight attached to the evidence by the sentencing judge. He may not prevail unless he demonstrates a palpable abuse of discretion. See Smith v. State, 407 So.2d 894 (Fla. 1981); Hargrave v. State, 366 So.2d 1 (Fla. 1979); Lucas v. State, 376 So.2d 1149 (Fla. 1979); Hitchcock v. State, 413 So.2d 741 (Fla. 1982); Michael v. State, 437 So.2d 138 (Fla. 1983); Johnson v. State, 442 So.2d 185 (Fla. 1983); Daugherty v. State, 419 So.2d (Fla. 1984); White v. State, 446 So.2d 1031

(Fla. 1984); Pope v. State, 441 So.2d 1073 (Fla. 1983); Wilson v. State, 436 So.d 908 (Fla. 1983); Fitzpatrick v. State, 437 So.2d 1072 (Fla. 1983).

Appellant is not aided by McCampbell v. State, 421 So.2d 1072 (Fla. 1982); that was a jury override case and pursuant to Tedder v. State, 322 So.2d 908 (Fla. 1975) the court was looking to factors presented which may have motivated the life recommendation. Appellant also cites Washington v. State, 62 So.2d 658 (Fla. 1978) but that case supports the state. There the mitigating factor of surrendering to authorities and confessing was deemed properly not found; the defendant did not surrender until his accomplices were apprehended and he knew he was sought by police (similarly in the instant case the confessions occurrred after appellant was apprehended in possession of the murder weapon and the victim's property). This court in Washington refused to speculate what the defendant's conduct might have been had he not been the focus of suspicion:

> "Such speculation is too slender a reed upon which to rest a reversal of the death sentences in these cases in light of the array of aggravating circumstances present."

(362 So.2d at 667)

The lower court sub judice correctly concluded that this mitigating evidence was too insubstantial to merit a finding of mitigation.

CONCLUSION

The judgments and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular mail to William G. Dayton, Esq., Attorney for Appellant, P. O. Box 1883, Dade City, Florida 34297, this 21st day of May, 1985.

OF COUNSEL FOR APPELLEE.