IN THE FLORIDA SUPREME COURT

JEFFREY A. MUEHLEMAN,

Appellant,

v. Case No. 65,546

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
COURT IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

APPELLEE ANSWER TO SUPPLEMENTAL BRIEF OF APPELLANT

JIM SMITH
ATTORNEY GENERAL

GARY O. WELCH
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

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SUMMARY OF ARGUMENT

This court's decision in Van Royal v. State, 11 F.L.W. 490 (Fla. Sept. 18, 1986), is not applicable to the instant case since the written sentencing order was filed and executed prior to certification of the record and since there was no jury recommendation of life.

ARGUMENT

THE TRIAL COURT EXECUTED IT'S SENTENCING ORDER PRIOR TO CERTIFICATION OF THE RECORD AND THE CORRESPONDING LOSS OF JURISDICTION.

In the appellant's supplemental brief he asserts that since the trial court orally announced the sentence on June 8, 1984; the appellant filed his notice of appeal on June 26, 1984; and the trial court filed its written order on August 28, 1984; the death penalty must be vacated under the teaching of Van Royal v. State, 11 F.L.W. 490 (Fla. Sept. 18, 1986).

Upon viewing Van Royal, supra, there are numerous and decisive differences. In Van Royal, the trial court waited more than one month after the jury recommendation to orally pronounce the death sentence. Furthermore, the notice of appeal in Van Royal was filed on November 7, 1984 and the appellate record was received by this Court on March 7, 1985. See attached order of this Court dated March 8, 1985 provided as appendix. Thereafter, the trial court executed a written sentencing order on April 15, 1985. Attached is sentencing order executed by circuit court in Van Royal. Whereas the written order in Van Royal was executed after the certification of the record, the trial court retained only jurisdiction for ministerial acts and not to make any substantive findings.[1] With this as a setting, this Court was also

[1] Van Royal incorrectly states that the written sentencing order was filed 6 months after certification of the record.

presented with a jury recommendation of life. When the jury has recommended mercy this Court will reduce the trial court death sentence to life if there is any reasonable basis for the jury recommendation. See Tedder v. State, 322 So.2d 908 (Fla. 1975) Thus this court determined that since there was no valid order upon which to determine that the trial court used the appropriate analysis in determining the propriety of the death sentence and since the lapse of time between the jury recommendation and the order which delineated the trial courts weighing process precluded this Court from determining whether the trial court had given the jury recommendation the great weight to which it was entitled,this court was left with only the presumption given to the jury recommendation of life, and as such, determined that death was inappropriate as a matter of law. Sub judice, the trial court was not concerned with Tedder or the great weight to be given a jury recommendation of life since the jury recommended death. Furthermore, this court order of November 7, 1984 discloses that the record in this case was certified to this court after the trial court filed its written sentencing order. As such, the written order was properly within the trial court's domain.

Appellee would also note that Van Royal is still on rehearing and submits that Van Royal as originally decided is a mutation which should be reconsidered in light of the following.

Contrary to this Court's opinion in Van Royal, §921.141(3) was not meant to be read in isolation so as to mandate a life sentence when procedural aspects of the statute are not followed, but

rather, that when §921.141 is read in the entirety, it is evident that §921.141(3) means that if the finding that the aggravating factors do not outweigh the mitigating the trial court must impose a life sentence. §921.141(3) should not dictate that when a trial court is derelict in timely performing the statutory weighing process that life must be imposed. As this court readily acknowledged in Van Royal, the weighing process is an integral part the death penalty scheme. To allow the decision to be made as to who is to receive death and who is to receive life without the benefit of the weighing process is in substance an arbitrary application of the death penalty scheme. Furman v. Georgia, 408 U.S. 238 (1972). The only difference between the imposition of a valid death sentence and a life sentence under Van Royal is the timing of the written order. Surely, the propriety in the death penalty cannot be distinguished in like cases merely on the grounds that the trial court's written findings were before the filing of a notice of appeal rather than the following day.

The trial court is not required to file written findings when he does a weighing of the sentencing factors and determines that the aggravating factors are insufficient to warrant the death penalty. When the trial court has found aggravating factors and the evidence clearly supports these findings beyond a reasonable doubt; it cannot be said that the trial court could not be completely overcome by the weight so as to announce his sentence orally after weighing the factors mentally. In fact, it is this type of case where the weight of the factors satisfy the Tedder v. State, 322 So.2d 908 (Fla. 1975), standard.

Van Royal apparently requires oral or written findings prior to the oral pronouncement of a death sentence and written findings to be made before jurisdiction is lost by the trial court. When is jurisdiction lost and the ability to provide a written sentencing order emasculated? If it is when a notice of appeal is filed can a criminal defendant rush to the clerk's office and thereby undermine a death sentence? If it is when a record is certified to this Court, could the chief judge order the clerk to refrain from transmitting the record until the trial court produces a written sentencing order? Can a criminal defendant avoid appellate review and a death sentence by not filing a notice of appeal? Van Royal makes these issues dispositive. However, these issues are not those which should provide an absolute bar to an otherwise legitimate death sentence. To remove such cases for any consideration is paramount to per se rule that the mitigating factors are not outweighed by the aggravating factors. Appellee submits that the bottom line in Van Royal is determined by the timing of procedural events rather than characteristic of the defendant, the record of the offender and the circumstances of the offense.[2] The per se life sentence based on procedural events rather than relevant sentencing criteria results in a life/death decision without any meaningful basis for distinguishing between those which receive life and those which receive death. See Furman v. Georgia, 408 U.S. 238 at 313 (1972) (White, J. concurring).

In Van Royal this Court determined that resentencing was

[2]These factors result in individualized sentencing and have been considered as legitimate consideration in determining the propriety of a death sentence. See Lockett v. Ohio, 438 U.S. 586 (1978).

not required and remanded for imposition of a life sentence was appropriate since the record was inadequate and not merely incomplete. Sub judice the record is complete. The findings are sufficient. As such, even if there was a Van Royal type error, any remand should be for a complete sentencing and not merely with directions that a life sentence be imposed.

CONCLUSION

Based on the above-stated facts, arguments and authorities, Appellee would pray that this Honorable Court affirm the decision of the lower court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

GARY O. WELCH
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular U. S. Mail to Robert F. Moeller Assistant Public Defender, Hall of Justice Building, 455 North Broadway, Bartow, Florida 33830-3798 this 29th day of October, 1986.

OF COUNSEL FOR APPELLEE