IN THE FLORIDA SUPREME COURT

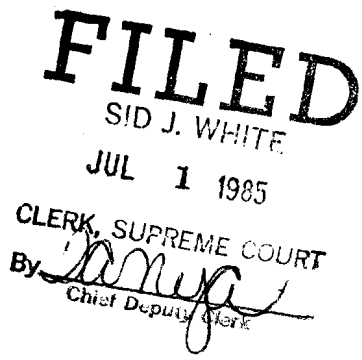
JEFFREY A. MUEHLEMAN, :

Appellant, :

vs. : Case No. 65,546

STATE OF FLORIDA, :

Appellee. :



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

REPLY BRIEF OF APPELLANT

JAMES MAPION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant JEFFREY MUEHLEMAN will rely upon his initial brief to reply to the arguments presented in the State's answer brief, except for the following additions regarding Issues I.A., I.B., II., III., IV., V., VI., VII., VIII., IX.B., IX.C., X.C., X.E., X.F., and X.G.

ARGUMENT

ISSUE I.

A.

THE COURT BELOW ERRED IN REFUSING TO SUPPRESS STATEMENTS JEFF MUEHLEMAN MADE TO LAW ENFORCEMENT AUTHORITIES, TO STATE AGENT RONALD REWIS, AND TO REPORTER CHRISTOPHER SMART, AS THE STATEMENTS WERE THE FRUIT OF AN ILLEGAL WARRANTLESS ARREST, AND SOME WERE OBTAINED IN VIOLATION OF MUEHLEMAN'S RIGHT TO COUNSEL AND RIGHT TO REMAIN SILENT.

B.

THE COURT BELOW ERRED IN REFUSING TO SUPPRESS PHYSICAL EVIDENCE OBTAINED FROM MUEHLEMAN AND HIS GARAGE APARTMENT, AS SUCH EVIDENCE WAS THE FRUIT OF AN ILLEGAL ARREST, AND WAS OBTAINED WITHOUT A WARRANT IN VIOLATION OF MUEHLEMAN'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

A. Statements.

Jeff Muehleman would first note that Appellee's brief totally ignores the fact that he was arrested for obstruction by false information pursuant to a statute which this Court has since held to be unconstitutional, as Muehleman discussed in his initial brief. Furthermore, facts which became known to the police after they seize a person cannot be used to justify the seizure. United States v. Robinson, 625 F.2d 1211 (5th Cir.1980). Muehleman had already been seized by Deputy Lions before the alleged obstruction by false information, and so this offense may not be used to justify the detention.

The State's brief misconstrues Muehleman's position. Muehleman does not concede that law enforcement authorities had justification for a full-blown investigative detention of the

type conducted here, which was not a simple Terry stop.[1/] Nowhere in his initial brief did Muehleman concede that the stop was justified, as Appellee would lead this Court to believe. (Brief of Appellee, pp. 6 and 7)

As the Robinson court noted,

> ...in order for a confession given after an illegal seizure to be admissible in evidence, the government must prove two things: that the confession is voluntary for purposes of the fifth amendment, and that the confession was not the product of the illegal seizure. [Citations omitted.]

625 F.2d at 1219. The government did not meet this burden in the lower court.

Contrary to the State's assertion, Muehleman's statements to Ronald Rewis do bear the taint of the illegal arrest. But for the arrest, Muehleman would never have come into contact with Rewis.

Johnson v. State, 438 So.2d 774 (Fla.1983) does not dispose of Muehleman's issue dealing with his statements to Rewis, despite Appellee's claim that Johnson is dispositive. In Johnson the trial court held that the detectives did not direct the informant to talk to Johnson or take notes on conversations the two men had. Here, in contrast, there was no such finding by the court below. Indeed, law enforcement authorities not only directed Ronald Rewis to tape his conversation with Jeff Muehleman, they outfitted him with the body bug he needed to do the job. Thus, to say, as Appellee does at page 10 of its brief, that "Rewis's

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[1/] Terry v. Ohio, 395 U.S.1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

use of a tape recorder no more makes him a state agent than did informant Smith's use of pen and paper in the Johnson case" is to ignore the significant factual differences between the cases. Appellee also overlooks the fact that the informant's notes apparently were not introduced into evidence at Johnson's trial, whereas the body bug tape made by Rewis was admitted in Muehleman's case.

The State's representative below conceded that Ronald Rewis was a State agent when he wore the body bug. Said the prosecutor:

> He [Rewis] was acting under the direction of law enforcement in wearing the tape. That would be the extent of it. In fact, it makes him an agent for that purpose and that would be a concession, that is what the facts would be.

(R566) In view of this concession, the State should be estopped to argue in its appellate brief that Rewis was not a State agent.

Even if this Court finds that Ronald Rewis was not acting as a State agent prior to the time he wore the body bug, and that the earlier admissions Muehleman made to Rewis hence were admissible, the tape recording from the body bug was particularly damaging, and its admission alone compels reversal.[2/]

B. Physical evidence.

Jeff Muehleman's consent to search his garage apart-

2/ At page 55 of its brief Appellee cites Jeff Muehleman's laughter on this tape as evidencing his supposed lack of remorse.

ment was tainted by his illegal arrest. See Robinson, supra, and Tennyson v. State, 10 FLW 931 (Fla.5th DCA April 11, 1985).

The Woodwards could not validly consent to a search of Muehleman's apartment, even if they did continue to have access to it while he lived there. Muehleman was the "aggrieved party" in search and seizure terms; he had a reasonable expectation of freedom from governmental intrusion into his living space. State v. Hutchinson, 404 So.2d 361 (Fla.2d DCA 1981). His landlords'access to his residence did not authorize them to consent to a search of it. People v. Ponto, 480 N.Y.S.2d 921 (N.Y. App.1984).

On the question of "standing," in United States v. Torres, 705 F.2d 1287 (11th Cir.1983) the court found house guests to have a reasonable expectation of privacy in their host's residence. The court noted that they ate and slept and stored their personal belongings there. Even though they did not have keys to the house, they, like Jeff Muehleman, were much more than casual visitors or mere transients. They adopted the owner's residence as their own, just as Jeff Muehleman adopted the Woodwards'

garage as his own residence. Like a motel room would have been, the garage was, however temporarily, equivalent to Muehleman's home for Fourth Amendment purposes. United States v. Bulman, 667 F.2d 1374 (11th Cir.1982).

ISSUE II.

JEFF MUEHLEMAN'S CONVICTION AND SENTENCE SHOULD BE VACATED, AS THEY WERE PREDICATED UPON INADMISSIBLE EVIDENCE.

Jeff Muehleman's case comes to this Court in a different posture than the case of Elledge v. Graham, 432 So.2d 35 (Fla.1983), cited by Appellee. There the appellant asserted in a habeas corpus petition that he was entitled to appellate review of his motion to suppress his confessions even though he pleaded guilty and did not raise this issue in the direct appeal of his death sentence. Here Muehleman is raising the issue in his direct appeal. (The State has not asserted that the admissibility of Muehleman's confessions at the penalty phase is not a proper subject for this Court to consider on appeal.)

Appellee recites a loose chain of circumstantial evidence which it claims could provide the factual basis for a first degree murder charge against Muehleman even if his confessions were inadmissible. These facts, however, are clearly insufficient for this purpose. This Court should keep in mind that Muehleman was not charged with Earl Baughman's murder until he made his June 8 confession (R854). The reason for this is obvious: until Muehleman confessed the authorities had no concrete evidence (and hence no "factual basis") to book him on the murder charge.

ISSUE III.

JEFF MUEHLEMAN'S ABSENCE FROM PORTIONS OF THE PPOCEEDINGS BELOW VIOLATED HIS CONSTITUTIONAL RIGHT TO BE PRESENT.

Appellee's reliance upon United States v. Gagnon, 470 U.S.____, 106 S.Ct.____, 84 L.Ed.2d 486 (1985) is misplaced,

as Gagnon was not a capital case.

Appellee claims that Muehleman's absences from the proceedings below were voluntary, but how can we know this when the record does not show that the court ever consulted Muehleman about whether or not he wished to be present? Muehleman again suggests that a remand for a hearing of the type held in the Ira Amazon case would be appropriate. (Please see Muehleman's initial brief, p. 33)

With regard to Appellee's claim that Muehleman's absences were voluntary, in Cross v. United States, 325 F.2d 629 (D.C.Cir.1963) the court raised the cogent question of how a defendant who was in continuing physical custody, as Jeff Muehleman was, could "voluntarily absent" himself from the proceedings (unless he escaped from custody).

Appellee cites Randall v. State, 346 So.2d 1233 (Fla. 3d DCA 1977) at page 21 of its brief for the proposition that a defendant need not be present at a jury charge conference. Randall was not a death penalty case. On the other hand, Harris v. State, 438 So.2d 787 (Fla.1983) was a death penalty case in which this Court stated that any waiver of instructions on necessarily lesser included offenses in a first degree murder case must be express and made knowingly and intelligently by the defendant himself, thus strongly suggesting that the presence of the defendant is required at the jury charge conference in a capital case.

Muehleman takes vigorous exception to Appellee's claim that he is trying to "sandbag" the State by waiving his presence and then asserting on appeal that his presence was required. As to the suppression hearing, the record shows no waiver by either Muehleman or his counsel, but only a discussion between opposing counsel concerning waiver (R578). With regard to the jury charge conference, there was no personal waiver by Muehleman himself, shown to be made knowingly and intelligently, but only a purported waiver by counsel outside Muehleman's presence (R2428). Under these circumstances the issue Muehleman has raised here is entirely proper, and the State's accusations that "gotcha!" maneuvers are being employed are singularly inappropriate.

ISSUE IV.

THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE DURING THE DEFENSE CASE A DOCUMENT ENTITLED "JUVENILE SOCIAL HISTORY REPORT," WHICH WAS HEARSAY AND CONTAINED EXTREMELY PREJUDICIAL IRRELEVANT MATERIAL, INVADED THE PROVINCE OF THE JURY, AND VIOLATED THE COURT'S PRETRIAL RULING ON DISCOVERY.

The record on appeal fails to support the claim Appellee makes at page 25 of its brief that Dr. Galloway used the Juvenile Social History Report in formulating two of his specific opinions concerning Jeff Muehleman's mental condition (R1036-1037).

In arguing that the Juvenile Social History Report was admissible, the State cites Section 921.141(1) of the Florida Statutes, which provides that when hearsay evidence, which the

Juvenile Social History Report clearly was, is admitted into evidence at the sentencing phase of a capital trial, the defendant must be "accorded a fair opportunity to rebut any hearsay statements." Muehleman was not afforded such an opportunity because the declarants were in Illinois, and Muehleman did not know before his trial began that the State would be permitted to use the Juvenile Social History Report against him. (The trial court had ruled pretrial that the rules of discovery would not apply to the sentencing phase, but reversed himself during trial and required Muehleman to provide the Juvenile Social History Report to the State, as discussed in Muehleman's initial brief.)

The Juvenile Social History Report contained not only rank hearsay, but evidence concerning offenses for which he either had not been charged or had not been convicted (R429-443). Evidence of this type was condemned in State v. Bartholomew, 683 P.2d 1079 (Wash.1984). There the court struck down a portion of the state's capital punishment statute as violative of the Eighth and Fourteenth Amendments to the United States Constitution as well as the state constitution. The offending provision permitted the jury to consider

> "any evidence which it [the court] deems to have probative value regardless of its admissibility under the rules of evidence, including hearsay evidence and evidence of the defendant's previous criminal activity regardless of whether the defendant has been charged or convicted as a result of such activity." (Emphasis by the court.)

683 P.2d at 1085. The court recognized that precedents established by the Supreme Court of the United States forbid admittance at

the sentencing phase of evidence that is unduly or unreasonably prejudicial to the defendant, such as the Juvenile Social History Report admitted below.[3/]

ISSUE V.

THE COURT BELOW ERRED IN ALLOWING THE STATE TO PRESENT DURING ITS CASE IN REBUTTAL EVIDENCE OF OTHER CRIMES ALLEGEDLY COMMITTED BY JEFF MUEHLEMAN.

At page 30 of its brief the State asserts that the testimony about other crimes allegedly committed by Jeff Muehleman was relevant for two purposes, but fails to show how the evidence actually served either of these purposes.

Appellee cites Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977) and Dixon v. State, 426 So.2d 1258 (Fla.2d DCA 1983) for the proposition that evidence going to the defendant's bad character or propensity to commit crime is admissible if and when "the defendant puts his character in evidence" (Brief of Appellee, p. 30). However, both Perkins and Dixon involved reversals of the defendant's convictions where the State introduced improper evidence of specific bad acts they allegedly committed.

If character evidence was admissible at the sentencing phase, the State should have introduced reputation evidence, not evidence of specific crimes allegedly committed by Jeff Muehleman. §90.405, Fla.Stat.(1983); Wrobel v. State, 410 So.2d 950 (Fla. 5th DCA 1982); Hodges v. State, 403 So.2d 1375 (Fla.5th DCA 1981); Dixon, supra.

[3/] Bartholomew is also relevant to Muehleman's Issue V.

ISSUE VI.

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE AS REBUTTAL EVIDENCE THE TRANSCRIPT OF A TAPED INTERVIEW WITH RICHARD WESLEY.

The State claims that use of Richard Wesley's taped statement was proper to rebut Dr. Galloway's diagnosis of Jeff Muehleman (Brief of Appellee, p. 34). However, Wesley's statement was not inconsistent with Dr. Galloway's diagnosis (R1054), and so did not serve to rebut it.

Appellee cites Jones v. State, 332 So.2d 615 (Fla.1976) for the proposition that any error is harmless where there is overwhelming evidence of statutory aggravating factors (Brief of Appellee, p. 34). However, Jones dealt with overwhelming evidence of guilt rendering error harmless. Indeed, this Court ordered Jones's death sentence vacated for imposition of a life sentence. Besides, the evidence of statutory aggravating circumstances presented below was not overwhelming, and there was substantial mitigation.

ISSUE VII.

THE COURT BELOW ERRED IN RESTRICTING JEFF MUEHLEMAN'S PRESENTATION OF EVIDENCE IN MITIGATION AND EVIDENCE RELEVANT TO THE CREDIBILITY OF A KEY STATE WITNESS.

The State seeks in its brief to uphold the admission of evidence which it says was used by defense witnesses in arriving at their testimony (Brief of Appellee, pages 25, 34),

and yet argues that the St. Petersburg Times newspaper article referred to by State witnesses (R845,857) was properly excluded (Brief of Appellee, pp. 36-37). Thus the State seeks to have it both ways.

The newspaper article was not cumulative, as Appellee claims. In it Jeff Muehleman spoke of his desire for rehabilitation and straightening his life out with God (R482), subjects that were not explored in the taped confession referred to in the State's brief (R351-360).

Neither was Edith Argustein's testimony cumulative. The fact that other people may have testified to loving and caring about Jeff Muehleman did not establish how his grandmother felt about him.

With regard to the transcript of Ronald Rewis' pre-trial conference and change of plea hearing, the paragraph that was withheld from the jury would have let them know how hard the State was pushing for a five year prison sentence for Rewis before he turned State's informant. It was pure speculation for the trial court to remark that the prosecutor's comments in the stricken paragraph may have addressed the nature and character of offenses not within the prosecutor's personal knowledge (R927).

ISSUE VIII.

THE COURT BELOW ERRED IN PERMITTING THE PROSECUTOR TO MAKE A NUMBER OF IMPROPER AND PREJUDICIAL COMMENTS TO THE JURY DURING HIS CLOSING ARGUMENT.

At page 43 of its brief, Appellee cites Darden v. State,

329 So.2d 287 (Fla.1976) in support of its argument that certain remarks of the prosecutor below were fair comment. In Darden the prosecutor referred to the perpetrator of the crime as a vicious animal; however, in that case it was defense counsel who first referred to the perpetrator as an animal. Muehleman's counsel did not similarly open the door for the assistant state attorney to make inflammatory remarks.

The State also cites Collins v. State, 180 So.2d 340 (Fla.1965). In Collins there was no objection to the remarks in question (although the Court apparently did not use this fact as the basis for its decision). The Court noted in Collins that each case must be considered on its own merits, taking into consideration the circumstances pertaining when the questionable remarks were made.

Appellee asserts at page 44 of its brief that certain remarks of the prosecutor "did not improperly influence the jury to reach a more severe verdict than warranted," but this is merely an unsupported summary conclusion.

ISSUE IX.

THE COURT BELOW ERRED IN GIVING INCOMPLETE AND MISLEADING INSTRUCTIONS TO THE JURY.

B. Failure to Instruct on Crime Having Been Committed While Defendant Under Influence of Mental or Emotional Disturbance.

The need for the trial court to give this instruction was not obviated merely because Dr. Mourer reversed his testimony

concerning whether or not Jeff Muehleman was under the influence of extreme mental or emotional disturbance at the time of the offense; it was up to the jury to decide which of his testimony represented his true opinion.

C. Instruction on Premeditation.

Reading the definition of premeditation at the guilt phase of a trial is an entirely different matter from reading it in connection with the aggravating circumstance of cold, calculated, and premeditated, as the court below did. Where a defendant is charged with premeditated murder and the jury must decide his guilt or innocence of this crime, the jury obviously must be instructed on the definition of premeditated murder. But here there was no guilt phase (because Muehleman pleaded guilty), and hence no necessity for the instruction on premeditation. Furthermore, when the definition of premeditation is read to a jury at the guilt phase of a bifurcated trial, it is temporally removed from the separate instructions the jury receives in the sentencing phase; it is not linked, as here, to the aggravating circumstance of cold, calculated, and premeditated by being read as part and parcel of the instruction on this aggravating circumstance.

ISSUE X.

THE TRIAL COURT ERRED IN SENTENCING JEFF MUEHLEMAN TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

C.

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Appellee's reliance upon Routly v. State, 440 So.2d 1257 (Fla.1983) is misplaced. Unlike the instant case, Routly involved a prolonged ordeal in which the victim was bound, gagged, kidnapped, and driven to a remote area before he was finally killed.

E.

THE TRIAL COURT ERRED IN FAILING TO GIVE ADEQUATE CONSIDERATION TO THE EVIDENCE MUEHLEMAN PRESENTED OF HIS SUBSTANTIAL MENTAL AND EMOTIONAL PROBLEMS.

The finder of fact is not free to disregard expert testimony that is virtually unrebutted. Strickland v. Francis, 738 F.2d 1542 (11th Cir.1984). Yet that is precisely what the court below did in refusing to recognize Muehleman's mental and emotional problems as a mitigating circumstance. This may perhaps be seen most glaringly in the court's failure to find in mitigation that Muehleman's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, even though Dr. Galloway found such an impairment (R493,1036-1037), and Dr. Mourer also found an impairment (R964,966).

F.

THE TRIAL COURT ERRED IN REFUSING TO GIVE CONSIDERATION TO COMMENTS JEFF MUEHLEMAN'S FAMILY PRESENTED AT THE SENTENCING HEARING.

Appellee's position seems to be that Jeff Muehleman was not legally entitled to a sentencing hearing before the court in view of the fact that he had a penalty phase before a jury. This, however, is not true. Rule 3.720(b) of the Florida Rules of Criminal Procedure requires a sentencing hearing at which the court shall "[e]ntertain submissions and evidence by the parties which are relevant to the sentence..." See also Hargis v. State, 451 So.2d 551 (Fla.5th DCA 1984). Thus the court was not gratuitously doing Muehleman a favor, as Appellee seems to suggest.

The right to put on evidence is rendered meaningless where, as here, the court refuses even to consider it.

G.

THE COURT BELOW ERRED IN FAILING TO GIVE ADEQUATE CONSIDERATION TO THE EVIDENCE JEFF MUEHLEMAN PRESENTED OF NON-STATUTORY MITIGATING CIRCUMSTANCES.

Contrary to Appellee's assertion at page 58 of its brief, Jeff Muehleman did not "go so far as to infer [sic] that Richard Wesley was the murderer." All Muehleman said to the authorities in this regard was: "'I'm so upset, I feel like telling you Richard did it but it wouldn't be right so I won't'" (R794).

With regard to the issue of Muehleman's behavior as a model prisoner constituting a mitigating circumstance, please see Griffin v. Wainwright, 588 F.Supp. 1549 (M.D.Fla.1984).

CONCLUSION

Appellant, Jeffrey A. Muehleman, renews his prayer for the relief requested in his initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602, this 28th day of June, 1985.

Robert F. Moeller
ROBERT F. MOELLER