IN THE FLORIDA SUPREME COURT

JAMES FLOYD,

Appellant,

vs.

Case No. 66,088

STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

James Floyd will be referred to as "Appellant" in this brief. The State of Florida will be referred to as the "Appellee." The Record on Appeal will be referred to by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's Statement of the Case and Facts as a substantially accurate account of the proceedings below with such exceptions or additions as set forth in the Argument portion of this Brief.

SUMMARY OF THE ARGUMENT

ISSUE I

The evidence establishing that the appellant confessed to trying to escape was admissable because it was relevant to prove the appellant's consciousness of guilt.

ISSUE II

This court and every other court but one that have considered the "Grigsby Issue" have rejected it as being without merit. This court should follow its own precedent in this area and affirm.

ISSUE III

The trial court did not error in not giving the instruction about considering any aspect of the appellant's background or character in mitigation because the appellant did not request it and did not object to the instructions as given.

ISSUE IV

The trial court did not reject Anne Anderson's testimony as a whole as the appellant's argument claims. Rather, the court rejected her personal feelings about capital punishment.

ISSUE V

Death is presumed to be the appropriate sentence if there is one or more valid aggravating factor and no mitigating factors, the case presented by these facts.

A. The victim in this case had a defensive wound, a stab wound going through her wrist. This type of wound is indicative of the mental anguish she suffered awaiting her rapidly impending

death. This court has previously recognized the significance of this type of wound in establishing this factor.

B. The evidence established that this murder was done in a cold calculated and premeditated manner. The pry marks on the window show that the appellant armed himself before he was discovered by the victim. And, the multiple stab wounds show that he carried out his attack even after disabeling the victim.

C. The appellant's argument that the trial court erred in finding that the appellant carried out this murder for the purpose of preventing or avoiding his arrest is only an invitation to this court to reweight the evidence. The fact finder could have reasonably concluded beyond a reasonable doubt from the evidence that the victim recognized her attacker and that the appellant killed her to keep her from testifying against him. She had a business card with his name on it. The pry marks show that he tried to escape before he could be recognized.

D. The appellant's doubling argument is without merit because the burglary had a broader significance than simple theft. The appellant attacked and killed the victim thereby broadening the scope of his crime. Accordingly, both for pecuniary gain and during the course of a felony apply here.

E. There is no requirement that a trial court find mitigating factors just because the appellant has presented evidence that might arguably support such a finding. The record demonstrates that the trial court looked for mitigating evidence but could not find any that rose to the level of establishing a mitigating factor.

ISSUE I

WHETHER THE ADMISSION OF A CONFESSION TO AN ATTEMPTED ESCAPE WAS PREJUDICIAL ERROR WHEN THE EVIDENCE WAS RELEVANT TO SHOW CONSCIOUNESS OF GUILT ON THE APPELLANT'S PART?

Under this point, the appellant's argument claims that it was error for the state to be permitted to introduce appellant's confession to trying to escape as the confession contained a reference to the appellant's having previously been in jail. The point is without merit. The evidence was relevant and was, therefore, properly before the jury. It showed consciouness of guilt on the appellant's part. The argument to the contrary is without merit because the evidence indicating other crimes in those cases had no relevance unlike the evidence here.

It has long been the well settled law of this state that all relevant evidence is admissable even if it tends to establish that the accused is guilty of a crime other than that for which he is currently standing trial. Williams v. State, 110 So.2d 654 (Fla. 1959); Green v. State, 190 So.2d 42 (Fla. 2d DCA 1966); Fla. Stat. §90.402 (1983) In analyzing the meaning of Williams the second district said:

> We analyze Williams to mean that evidence of other offenses is admissable if - - - - it is relevant and has probative value in proof of the instant case or some material fact or facts in issue in the instant case, 190 So.2d at 46.

The evidence at issue here was relevant because it helped establish guilty knowledge on the appellant's part. The case law of this state recognizes the relevance of this type of evidence even when it establishes that the accused is guilty of some currently uncharged crime. For example, in Mankiewicz v. State, 114 So.2d 684 (Fla. 1959) cert. denied 456 U.S. 965 this court ruled such evidence proper. There the court approved the admission of evidence establishing the theft of a car from near the scene at which Mackiewicz was shot shortly after the shooting. And, it also approved the introduction of evidence of Mackiewicz arrest in a stolen car a short time later together with evidence showing his attempted escape from a jail. The court applied the rule of relevance to this evidence and found it relevant to establish consciousness of guilt.

More recently, in Sireci v. State, 399 So.2d 964, 968 cert. denied 456 U.S. 984 and Straight v. State, 397 So.2d 903, 908-909 (Fla. 1981) cert. denied 454 U.S. 1022 this court applied the rule of relevancy in upholding the admission of evidence showing the accused to be guilty of uncharged crimes. In Sireci this court ruled that evidence from one of Sireci's former cellmate's that Sireci had told him that he had attempted to have a witness against him killed. In Straight, this court found evidence that Straight fled from police and used a gun when they tried to apprehend him in California was relevant as it showed consciouness of guilt on Straight's part.

The testimony at issue here was a confession to an attempted

escape or an attempt to evade prosecution. This kind of evidence has consistently held to be relevant. This court should so hold here and affirm the appellant's conviction over this objection his part.

Appellant's argument relies on Dibble v. State, 347 So.2d 1096 (Fla. 2d DCA 1977); State v. Norris, 108 So.2d 541 (Fla. 1964) and Green v. State, 190 So.2d 42, 45 (Fla. 2d DCA 1966) to support its assertion that Detective Totz's testimony concerning the appellant's spontaneous statement constitutes reversible error under the circumstances of this case since it suggested appellant's guilt of an uncharged crime. But, these cases do not address the factual situation presented by these facts. The evidence in the appellant's cases indicating other crimes was not of the type showing consciousness of guilt. In Dibble the reference was to the possibility of other unrelated crimes having no relevance to the charged crime. In Norris, the reference was to another possible homicide where there was no evidence to show any link to the crime charged. While in Green, the evidence was to a wholly unrelated robbery. None of the cases deal with the kind of evidence like that before the trial court showing consciouness of guilt.

ISSUE II

WHETHER THE APPELLANT SHOULD BE ALLOWED TO MAKE A GRIGSBY TYPE ARGUMENT WHERE HE MADE NO SUCH MOTION BELOW, PRESENTED NO EVIDENCE IN BEHALF OF SUCH A CLAIM AND STIPULATED TO THE EXCLUSION FOR CAUSE OF SOME DEATH SCRUPLED PROSPECTIVE JURORS AND WHETHER HE CAN PREVAIL ON THIS ISSUE WHERE THIS COURT HAS AUTHORITATIVELY REJECTED THIS CLAIM?

The appellant did not file an appropriate Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc) type motion. Nor, did he present any evidence in support of such a motion. Nor, did he raise this type of objection when he argued about whether a given prospective juror should be excluded for cause under the teaching of Witherspoon v. Illinois, 391 U.S. 510 (1968). In fact, appellant's trial counsel stipulated to the exclusion of prospective jurors when he was convinced that they met the Witherspoon standard for exclusion. (R 242, 347) Accordingly, it is abundantly clear that he may not raise the issue here. By failing to present it to the trial court he waived it.

Even had he preserved this issue properly it would fail. This court has authoritatively rejected the constitutional validity of the argument. Dougan v. State, No. 65,217 (Fla. May 30, 1985) (collecting cases); Patten v. State, 10 F.L.W. 244, 246 (Jan. 10, 1985) (revised opinion released in May 3, 1985 in F.L.W. original opinion at 10 F.L.W. 51); Dobbert v. State, 409 So.2d 1053 (Fla. 1982); Riley v. State, 366 So.2d 19 (Fla. 1978). This is in keeping with all other jurisdictions that have

considered the issue but the Eighth Circuit. McCleskey v. Kemp, 753 F.2d 897 (11th Cir. 1985) (en banc); Keeton v. Garrison, 742 F.2d 129 (4th Cir. 1984); Spinkillink v. Wainwright, 578 F.2d 582, 583-586 (5th Cir. 1978) cert. denied 440 U.S. 976 (1979). The United States Supreme Court has also shown how it feels about the issue. It was a big part of the dissent in Witt v. Wainwright, ___U.S.___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) See also Witt v. Wainwright, 36 Cr.L. 4227 (1985) (on application for stay of execution). The appellant's position is simply without merit on both procedural grounds and the merits.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN NOT GIVING PENALTY PHASE INSTRUCTIONS THE APPELLANT'S TRIAL COUNSEL DID NOT REQUEST?

The appellant's argument under this point contends that it was error for the court below not to instruct the jury on any mitigating factors before they retired to deliberate on the penalty to be imposed on this appellant. There was no error in this regard. The appellant's trial counsel requested only one instruction on mitigating circumstances. And, he withdrew this request after the court offered the state an opportunity to reopen its case to introduce evidence contradicting the claim. Accordingly, the appellant has not preserved this issue for review and has waived any error they may have been instructing on mitigating evidence.

During the course of the charge conference for instructing the jury on the penalty phase issues, appellant's trial counsel requested only one instruction. He asked the court to instruct the jury on the appellant's not haivng a significant history of criminal activity. (R 917) The appellant had not submitted any evidence on this issue when he and the opportunity to do so. When he learned that the court would offer the state an opportunity to reopen its case to offer evidence in rebuttal, he said, "Then let's not do it." (R 918) He requested no other instruction from the court. Nor, did he voice any objection to the instruction as given. (R 931)

This is not the first time this court has faced a claim on appeal that a trial court should have given an instruction on mitigating evidence during the penalty phase of a trial that it was not requested. For example, in Bottoson v. State, 443 So.2d 966 (Fla. 1983), the appellant argued on appeal that the trial court had erred in not instructing the jury that it could recommend life imprisonment even if it found the existence of aggravating circumstances and no mitigating circumstances. This court dispoed of the claim in one sentence. It said, "since appellant did not object to the instructions given, he has waived this objection. Demps v. State, 395 So.2d 501 (Fla.), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981)" 443 So.2d at 966

This court's decision in Vaught v. State, 410 So.2d 147 is to like effect. There, the argument on appeal was that the trial court had not given instructions on aggravating and mitigating circumstances that reflected refinements in the law expressed in this court's case law. Again, the court disposed of the argument in one sentence. It said, "Since appellant made no objection to the instructions below, this point may not be raised on appeal. Fla. R. Crim. P. 3.390(d); McCaskill v. State, 344 So.2d 1276 (Fla. 1977). 410 So.2d at 150

As the court noted in Vaught, these decisions do no more than implement the provisions of Fla. R. Crim. P. 3.390(d). The application of the law to the facts of this case is simple and strightforward. The court must rule that the appellant waived

the right to made this argument on appeal.

The appellant points to several decisions in support of the argument for reversal under this point, Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Songer v. State, 365 So.2d 696 (Fla. 1978) and Cooper v. State, 336 So.2d 1133 (Fla. 1976). None of those case require reversal under this point. Lockett addressed a statute that limited mitigating circumstances in a capital case. Eddings addressed a trial court's conclusion that it was precluded from considering evidence of a turbulent family background in evaluating the appropriate penalty for a sixteen year old. Songer expressed this court's understanding of the sentencing scheme in effect in this state to the effect that the statute does not preclude either the judge or jury from considering nonstautory mitigating circumstances in deciding on the appropriate penalty. And, Cooper decided that there was no error in excluding evidence that was not relevant to the sentencing decision. The decisions plainly do not address themselves to the question this case presents, whether it was error for the circuit court not to give instructions that were not requested. Accordingly, those decisions are not aposite to this issue. The appellant waived the right to make this argument in the trial court and this court should affirm over this objection.

ISSUE IV

WHETHER THE TRIAL COURT FOUND THAT ANNE ANDERSON'S TESTIMONY WAS IRRELEVANT TO THE SENTENCING DECISION?

Under this point, the appellant contends that the trial court ruled that Anne Anderson's testimony was irrelevant to the sentencing decision. The state can not accept such an assertion. It is far broader than any such ruling on the part of the trial court. The appellant's argument sets up a straw man to knock down.

In referring to the witness' expected testimony the court said, "We are only interested in evidence relative to the nature of the crime and character of the defendant." It clearly recognized the possibility of non statutory mitigating circumstances. (R 894) When the court referred to the witness' meeting with him in chambers before he pronounced sentence, he did not, as the argument of the appellant asserts, reject her testimony as a whole. Rather, he rejected her personal feelings about capital punishment. (R 948, 949) And, he spoke of looking for mitigating factors legal or otherwise and being unable to find them. (R 949 see also R 950)

To the extent that the argument seeks to fault the trial court for not finding mitigating circumstances that argument is without merit. There was no error here because the court considered all the evidence it had before it. That is the only requirement. A court need not find a mitigating factor just

because someone thinks that there was evidence that would justify such a finding. In Porter v. State, 429 So.2d 293 (Fla. 1983), this court had occasion to address as very similar argument. This court's analysis is just as apposite here. In addressing the contention this court said:

> There is no requirement that a court must find anything in mitigation. The only requirement is that the consideration of mitigating circumstances must not be limited to those listed in section (21.141(6), Florida Statutes (981). What Porter really complains about here is the weight the trial court accorded the evidence Porter presented in mitigation. However, "mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence. Quince v. State, 414 So.2d 185, 187 (Fla. 1982), 429 So.2d at 296

This court recently affirmed this principle in its decisions in Lusk v. State, 446 So.2d 1038 (Fla. 1984); White v. State, 446 So.2d 103 (Fla. 1984); Daugherty v. State, 419 So.2d 1067 (Fla. 1982) cert. denied 103 S.Ct. 1236 (1983); Riley v. State, 413 So.2d 1173 (Fla.) cert. denied, 103 S.Ct. 317 (1982). The appellant's argument under this point is simply without merit.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE.

The appellant raises five sub issues under this point four of which attack the findings of aggravating circumstances and one of which attacks the courts not finding any mitigating factors. Since there is no other place for the state to argue it, the state takes this opportunity to point out that death is presumed to be the appropriate sentence if there is one or more valid aggravating factor and no mitigating factor. Griffin v. State, No. 62,819 (Fla. May 2, 1985); Demps v. State, 395 So.2d 501 (Fla. 1981); State v. Dixon, 283 So.2d 1 (Fla. 1973). Accordingly even if some of the aggravating factors do not apply there is no need for reversal because the court below correctly found no mitigating factors.

A.

Under this subpoint, the appellant claims that the trial court incorrectly found that the murder of the victim in this case was especially heinous, atrocious and cruel. The point is without merit. The evidence before the trial court established the factor. The defensive wounds on the victim set this case apart from the norm. (R 405, 424, 454, 962) This court recognized the significance to this type of wound pattern in Lusk v. State, supra. And, it is indicative of the type of mental anguish the victim must have suffered awaiting her rapidly

impending death at the appellant's hands. Although not explicitly challenged, this court just recently approved such a finding of this factor on essentially the same fact pattern in support of a death sentence. Wright v. State, No. 64,391 (Fla. July 3, 1985) [10 F.L.W. 364] (burglar surprising victim in her own home and cutting her throat) This is a sufficient basis for upholding the existence of this aggravating factor. Francois v. State, 407 So.2d 885, 890 (Fla. 1982).

B.

The appellant's argument under this subpoint contends that the trial court erred in finding the "cold calculated and premeditated" aggravating factor in support of the death sentence. The focus for the determination of proof of the existence of this factor is on the actor's state of mind. Hill v. State, 422 So.2d 816 (Fla. 1982) Proof of this factor requires proof of heightened premeditation, more than would be necessary to prove the premeditation element of the crime. Proof of this factor usually is found in the context of contract killings or execution style slayings. But, those classes of killings are not all inclusive of facts supporting a finding of this factor. Cannady v. State, 427 So.2d 723, 730 (Fla. 1983); McCray v. State, 416 So.2d 804, 807 (Fla. 1982).

The facts of this case show that the state proved this aggravating factor beyond a reasonable doubt. The pry marks on the window demonstrate that the appellant armed himself before the attack on the victim. This indicated his willingness to use deadly violence. This court found that such a circumstance to be

significant a part of the evidence establishing this aggravating factor in Mason v. State, 438 So.2d 374, 379 (Fla. 1983). The attack involved multiple stab wounds including the stab through the wrist. This indicates a continuation of the assault after the victim was already disabled. This court found a continuation of an assault sufficient to support this factor in Squires v. State, 450 So.2d 208, (Fla. 1984) (additional wounding to insure death supported finding of this factor) and Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984) (firing second shot after victim had fallen to the floor). Accordingly, it is clear that there was no error on the part of the trial court in finding this aggravating factor.

C.

The trial court found that the evidence established beyond a reasonable doubt that the appellant killed the victim to avoid or prevent his arrest. This finding was correct and it is supported by the evidence. The elimination of the witness was the only motive for this killing. The appellant's argument to the contrary is simply without merit. It amounts to no more than an invitation to this court to substitute its judgment for that of the fact finder. This is, of course, inappropriate.

The appellant's argument cites the court to the decisions in Foster v. State, 436 So.2d 56 (Fla. 1983) and Rembert v. State, 445 So.2d 337 (Fla. 1984) respectively to support the assertions that neither factor indicated by the trial court supports a finding of this aggravating factor. Accordingly, it is

appropriate to review this aspect of these decisions for such light as they may shed on the fact of this case.

In Foster, the evidence showed that the victims had been shot in the back, their pockets had been turned inside out and their wallets were missing. Money and a pistol were missing from one of the victims business. Other evidence including finger prints, fruits of the crime and the testimony of a former co-defendant tied Foster to the murder. Relying on a previous holding that this aggravating factor cannot be assumed but must be proved, this court discarded this aggravating factor against Foster saying that the mere fact of death of someone other than a police officer is not sufficient to show this factor. But, the facts here go beyond a simple showing of death. The pry marks indicate that the the appellant tried to escape before he could be seen by the victim. And, the business card with the appellant's name on it shows that the victim knew the appellant. The appellant was much larger than the victim and could have simply pushed her aside to get away. Instead, he chose to kill her. The fact finder concluded that the only reasonable inference to the drawn from these facts was that the appellant killed the victim to avoid or prevent his lawful arrest. Cf. Heiney v. State, 447 So.2d 210 (Fla. 1984) (whether circumstancial evidence excludes every reasonable hypothesis of innocence is a question for the fact finder).

In Rembert, this court rejected a finding of this factor where the evidence established that the victim was alive when

Rembert left the crime scene and conceivably could have survived to identify the appellant as the attacker. This court noted its previous teaching that the mere fact of death is not sufficient to support a finding of this aggravating factor when the victim is not a law enforcement officer and struck that aggravating factor from the trial court's findings. As previously set out this case has more than simply proof of the death of the victim. There was no reason for the victim to keep the business card with the appellant's name on it in his long dead husband's hand unless she knew him and continued to have an interest in using his services. It also shed light on why the appellant chose this victim as he knew her to be helpless.

The evidence in this case clearly established beyond a reasonable doubt that the appellant killed the victim to avoid or prevent his lawful arrest. This court should, accordingly, affirm this finding by the trial court in support of the appellant's death sentence.

D.

Under this sub point, the appellant's argument contends on the authority of Clark v. State, 379 So.2d 97 (Fla. 1979) and Provence v. State, 337 So.2d 783 (Fla. 1976) that the circuit court erred to his prejudice by finding two aggravating factors based on the same facts. The contention is that the evidence of precuniary gain and burglary are based on the same facts. The argument is without merit.

It is only when two aggravating factos are based on the same

essential feature of the crime or the offender's character that they cannot both be considered as aggravating factors. Agan v. State, 445 So.2d 326, 328 (Fla. 1983), Waterhouse v. State, 429 So.2d 301 (Fla. 1983). One aspect of a crime may reflect more than one "essential feature" of the crime. For example in Squires v. State, 450 So.2d 208 (Fla. 1984) this court found no improper doubling where manner of crime established both heinous atrocious and cruel and cold calculated and premeditated aggravating factors. Likewise, in Agan v. State, 445 So.2d 326 (Fla. 1983) this court rejected the argument that findings in support of a death sentence predicated on the appellant's having been under a sentence of imprisonment and having previously been convicted of a crime involving violence amounted to impermissable doubling as the sentence of imprisonment. Agan was under for murder and robbery the crimes involving violence. The court said that there factors were not based on the same essential feature of the crime or the offender's character. Thus, there was no error in the trial court's finding of both the murder for pecuniary gain aggravating factor with the cold calculated and cruel factor.

The appellant's analysis is flawed because it rests on a faulty understanding of the prohibition against doubling. In Provence, this court ruled that it is error to find two aggravating factors when they are both based on the same evidence and the same aspect of the defendant's crime. The court went on to rule in that case that the circuit court should not have found

both murder committed during the course of a robbery and murder committed for pecuniary gain. Recently this court ruled in Mills v. State, No. 63,092 (Fla. Jan. 10, 1985) that evidence showing that showed that the victim suffered great mental anguish awaiting the defendant's exeuction style murder established both cold calculated and premeditated and heinous atrocious and cruel aggravating factors. Likewise, in Squires v. State, 450 So.2d 208, 213 (Fla. 1984 this court ruled that evidence establishing the defendant's status as an escapee and previous life felony convictions were separate and each supported the finding of an aggravating factor. That decision offers a particularly compelling analogy here.

Here the murder occurred when the appellant converted his burglary into a robbery. Accordingly, this is one of those cases where the existence of multiple felonies justifies both aggravating factors being found. Here as was the case in Brown v. State, No. 62,922 (Fla. June 27, 1985) [10 F.L.W. 343] the burglary had a broader significance than simple theft it involved as did Brown the battery on the victim that resulted in her death. See also Hill v. State, 422 So.2d 816, 819 (Fla. 1982) (finding no improper doubling when there was distinct proof as to each factor) There was no error here. This court should affirm the circuit over the doubling objection presented under this subpoint.

Even if there was improper stacking the error is harmless. There was other properly found aggravating factors and no

mitigating factors. Thus, the case is not analytically distinguishable from this court's decision in Sireci v. State, 399 So.2d 964, 968 (Fla. 1981) (cert. denied 102 S.Ct. 2257 rehearing denied 102 S.Ct. 3500 for the purposes of a harmless error analysis of this claim. See also Clark v. State, 379 So.2d 97 (Fla. 1980). This court shold affirm the sentence over this objection.

E.

The final argument tries to fault the trial court for not finding mitigating factors that the appellant thought it should find. There was no error here because the court considered all the evidence it had before it. That is the only requirement. A court need not find a mitigating factor just because someone thinks that there was evidence that would justify such a finding. The circuit court did not commit any error in its findings of aggravating and mitigating circumstances. He contends that the trial court failed to find mitigating circumstances that the evidence might arguably support. The contentions are without merit. In Porter v. State, 429 So.2d 293 (Fla 1983), this court had occasion to address a very similar argument. This court's analysis is just as apposite here. In addressing the contention this court said:

> There is no requirement that a court must find anything in mitigation. The ony requirement is that the consideration of mitigating circumstances must not be limited to those listed in Section 921.141(6), Florida Statutes (1981). What Porter really complains about here is the weight the trial court accorded the evidence Porter presented

> in mitigation. However, "mere disagreement with the force to be given [mitigation evidence] is an insufficient basis for challenging a sentence." Quince v. State, 414 So.2d 185, 187 (Fla. 1982). 429 So.2d at 296.

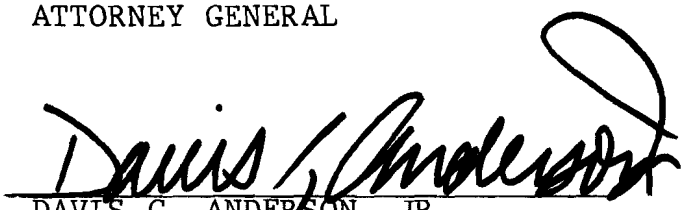
This court recently affirmed this principle in its decision in Lusk v. State, 446 So.2d 1038 (Fla. 1984); White v. State, 446 So.2d 103 (Fla. 1984); Daugherty v. State, 419 So.2d 1067 (Fla. 1982) cert. denied 103 S.Ct. 1236 (1983); Riley v. State, 413 So.2d 1173 (Fla.) cert. denied, 103 S.Ct. 317 (1982). The appellant's argument under this subpoint is without merit.

CONCLUSION

Based on the foregoing argument and citations of authority, the Appellee submits that the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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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 W.C. McLain, Assistant Public Defender, 455 North Broadway Avenue, Bartow, Florida 33830 this 17 day of July, 1985.

OF COUNSEL FOR APPELLEE.