IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,224

PATRICK JAMES THOMPSON,

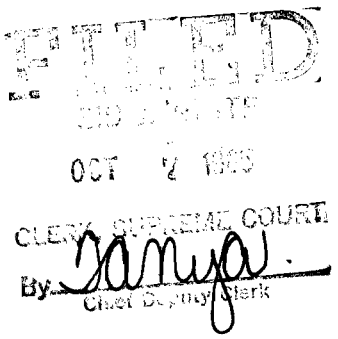
Appellant,

v.

STATE OF FLORIDA,

Appellee,

_____/



ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, THOMAS M. COKER, JR., JUDGE

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT AND EXPLANATION OF REFERENCES

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court for the Seventeenth Judicial Circuit, in and for Broward County, Florida. The parties will be referred to as they appear before this Court.

The symbol "R" will denote the record on appeal. All emphasis in this brief is supplied by Appellant unless otherwise indicated.

STATEMENT OF THE CASE

Appellant relies on the Statement of the Case as set out in his initial Brief on Appeal.

STATEMENT OF THE FACTS

Appellant relies on the Statement of the Facts as set out in his initial Brief on Appeal.

SUMMARY OF ARGUMENT

I

Appellee's argument that evidence existed to support the trial court's findings, disregards the fact that the trial court was duty-bound to apply the Tedder standard in determining whether to impose the death sentence. The jury's recommendation of life in prison was well supported by mitigating circumstances and lack of proof beyond a reasonable doubt of aggravating circumstances.

II

The irrelevant collateral crime evidence only shared general similarities with the instant case. The circumstantial evidence presented against Appellant was so weak that the introduction of the collateral crime evidence cannot be considered harmless.

III

The introduction of a Right's Waiver Card with Appellant's handwritten notation that he would reserve his right to refuse to speak with the police "at my discretion" was fairly susceptible as a comment on the exercise of his Fifth Amendment rights and constituted reversible error in the context of this case.

ARGUMENT

POINT I

THE APPELLANT'S DEATH SENTENCE SHOULD BE REVERSED

A. JUDGE COKER DID NOT GIVE PROPER WEIGHT TO THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT: HE FAILED TO APPLY THE TEDDER STANDARD.

In paragraphs A, B, C and D of its brief, Appellee argues that sufficient evidence existed for the trial court to reach the conclusion that four aggravating circumstances existed and that, therefore, the Tedder */ standard was satisfied.

Appellee misconstrues the Tedder standard. As this Court clearly stated:

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. Tedder at 910.

Clearly the standard is not "could the trial court find a basis to conclude that aggravating circumstances exist anyway," as Appellee's argument seeks to suggest. See, also Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983)(It is well settled that a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion); McCampbell v. State, 421 So.2d 1072 (Fla. 1982). Thus, even when

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*/ Tedder v. State, 322 So.2d 908 (Fla. 1975)

a trial court makes findings of fact that are "within his domain as the trier of fact," this Court must still examine the record to determine whether the jury's giving different "credence to... [the] testimony than the trial judge is a permissible and reasonable application of the aggravating and mitigating factors." Cannady v. State, 427 So.2d 723, 731 (Fla. 1983).

In the case sub judice, the jury's recommendation of life in prison had a rational basis. Judge Coker failed to demonstrate a sufficient basis for disregarding the jury's advisory verdict and, therefore, the death sentence must be overturned.

1. Prior conviction of felony involving force or threat of force

Though a basis for concluding that Section 921.141(5)(b) (conviction of prior felony involving force or threat of force) was applicable existed, the jury was nevertheless entitled to reject its application and assign little or no weight to it in light of the evidence given by Deborah Fifer at trial. Ms. Fifer was never hit, kicked, or caused bodily injury, nor was she shown a weapon. (R.1107, 1108, 1112-1113) Thus, the jury could and did assign the two convictions which resulted from the incident little or no weight. The jury's qualitative judgment on the weight to be assigned this incident cannot be ignored. As often stated by this Court, the assessment of aggravating and mitigating circumstances is not a mere tabulation of numbers. Similarly, the weight to be given a particular factor is for the jury to determine.

2. Whether the capital felony was committed while the Defendant was engaged in or attempting to commit sexual battery.

Appellee argues that the explanation for the victim's murder was that she put up a struggle when an assailant sought to engage in sexual relations. However, the victim may well have put up a struggle against an assailant who sought to harm her. The evidence showed that semen found on a vaginal swab was consistent with her having had sex with her boyfriend. (R.839, 840, 876-877, 500) The medical examiner found no trauma around the vagina and no evidence of sexual battery. (R.617) Thus, the one hair which was found on the victim and which was found consistent with Appellant's hair by FBI agent Deedrick could have been legitimately discounted in light of Deedrick's testimony that hair analysis is not a basis for absolute personal identification. (R.1061)

3. Whether the jury could have rationally rejected the aggravating circumstance of especially Heinous, Atrocious and Cruel.

Appellee argues that the victim's death by strangulation was heinous, atrocious and cruel.

However, the cases cited by Appellee to support his contention are all cases where the jury, the conscience of the community, found that the strangulations were especially heinous, cruel and atrocious and recommended the death penalty. See, Johnson v. State, 465 So.2d 499 (Fla. 1985); Lemon v. State, 456 So.2d 885

(Fla. 1984); Doyle v. State, 460 So.2d 353 (Fla. 1984); Bundy v. State, 455 So.2d 330 (Fla. 1984); Smith v. State, 407 So.2d 894 (Fla. 1981).

Clearly, the jury understood that all killings are atrocious and that the victim's killer exhibited cruelty by any standard of decency, but, likewise, it understood that more had to be shown to support a finding of heinous, atrocious and cruel. The jury found in the case sub judice, as this Court found in Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975), "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." Halliwell involved a bludgeoning murder. Also see, Tedder v. State, 322 So.2d 908 (Fla. 1975); Jones v. State, 332 So.2d 615 (Fla. 1976).

4. Whether there was a basis for finding that the murder was committed in a cold, calculated and premeditated manner.

Despite the trial court's equivocal finding that this aggravating circumstance may or may not apply (R.1770), and the jury's apparent rejection of this factor, nevertheless, Appellee argues that no rational basis exists for rejecting this aggravating circumstance.

Contrary to Appellee's claim, however, the State's own evidence concerning Appellant's alleged modis operandi negates this aggravating circumstance. Evidence adduced from Deborah Fifer, the woman Appellant was convicted of kidnapping and sexually assaulting previously, showed that no violence was used

by Appellant against Deborah Fifer. Deborah Fifer was not hit, kicked, cut, or bodily injured, other than the sexual battery. Thus, in light of the State's own evidence, ample room existed for the jury to find that Appellant did not coldly calculate to commit a murder.

B. THE TRIAL COURT IGNORED VALID MITIGATING CIRCUMSTANCES.

Appellee claims that because expert medical or psychological witnesses did not testify as to Appellant's emotional problems, a finding of mitigating circumstances under Section 921.141(6)(b) is not supportable.

Appellee here ignores the testimony of witnesses it produced at trial to support the admission of collateral crime evidence. Those witnesses testified that both at the time of the collateral crime and the time that the victim was murdered the Appellant was having emotional problems in his relationships. See the testimony of Janet Swift (R.937-938) and the cross-examination of Appellant (R.1336-1337, 1338). Further, the State elicited testimony that Appellant had been fired from his job prior to January, 1983 (R.1327-1328). The jury could properly use this evidence to reach the conclusion that a mitigating circumstance existed. No conflicting testimony as to Appellant's mental state was introduced by the State. Appellee's citations to Johnson v. State, 442 So.2d 185 (Fla. 1983) and Michael v. State, 437 So.2d 138 (Fla. 1983) are not applicable to the instant case since in both the trial court rejected the mitigating circumstances after

the jury recommended death. Obviously, in each case, the jury resolved the factual question against the defendant. Not so in the case sub judice. Here, evidence existed for a finding in mitigation and the jury recommended life. In light of that fact, it is the trial court's finding of mitigating circumstances which must be set aside.

Furthermore, Appellant's adjustment to life in prison should be weighed heavily as a non-statutory mitigating circumstance. The testimony of Deacon Carroll goes beyond the barren statement found inadequate by this Court in Burr v. State, 466 So.2d 1051 (Fla. 1985) that the defendant was "a good man and raised a Christian." Then, too, it must be remembered that Burr not only killed a convenience store clerk in the course of a robbery, but he went on to commit three more robberies within nineteen days, where he informed the clerks he would kill them and, in fact, he shot three other clerks. Id at 1052. Deacon Carroll testified Appellant was a positive influence in the jail environment. Appellant helped fill Bible class, he dealt with inmates and guards, and he was able to obtain cooperation from both groups. (R.1538-1539)

All other cases cited by Appellee in support of discounting mitigating evidence involved jury recommendations of death. Where the jury has recommended death, the factors and considerations are far different than where life is recommended. See, Williams v. State, 437 So.2d 133 (Fla. 1983).

Appellee claims that Appellant merely registers his disagreement with the lack of weight given the evidence of

mitigation by the trial judge. However, Appellee, in so arguing, disregards the trial court's failure to grant the jury recommendation of life the proper deference it requires under the Tedder standard. As this Court stated in Tedder 322 So.2d 908, 910 (Fla. 1975), "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Here, the majority of reasonable individuals on the jury, relying on evidence presented to them, recommended life in prison. Ample evidence suggesting both a statutory mitigating circumstance and non-statutory mitigating circumstances was brought to the jury's attention. The trial court, therefore, was bound to abide by the jury's recommendation as mandated by Tedder and numerous cases following Tedder. Therefore, to suggest that Appellant is merely registering disagreement with the lack of weight given by the trial is misleading. The trial court was required to view the evidence of mitigating circumstances in the light most favorable to the jury's recommendation. That he failed to abide by this legal standard is Appellant's point.

The recommendation of life was based on valid mitigating factors. Evidence was introduced by the State, in its effort to render admissible evidence of a prior crime, to show that Appellant was acting while under emotional disturbance. The jury could certainly have taken that into consideration. Contrast, Stevens v. State, 419 So.2d 1058 (Fla. 1982) at 1064, where this Court noted that a Court-appointed psychiatrist reported no

extreme mental or emotional disturbances found in Stevens. By contrast, in the case sub judice, no court-appointed psychiatrist testified as to Appellant's mental state and, in fact, the State, in its case, introduced evidence of marital/relationship problems immediately preceding the incident which led to Appellant's convictions for kidnapping and sexual battery in 1981 and the instant case. Thus, unlike Stevens, where the Court's override of the jury verdict was upheld, the jury override in this case ignored evidence which reasonable persons, such as the jury, took into consideration.

POINT II

THE TRIAL COURT ERRED IN ALLOWING IRRELEVANT COLLATERAL CRIME EVIDENCE TO PREJUDICE THE JURY.

Appellee seeks to draw this Court's attention to alleged similarities between the murder of Patricia Nigro and the kidnapping/sexual battery of Deborah Fifer (the victim of the collateral crime introduced into evidence).

However, none of the alleged similarities rise beyond mere general similarity, age of victim, shoulder length hair of victim, attacks on a weekday, etc. The dissimilarities between the two crimes are far more striking. Patricia Nigro was severely beaten and she suffered defensive wounds, apparently attempting to shield herself from a knife attack. Deborah Fifer never saw a weapon.

Appellee's reliance on Burr v. State, 466 So.2d 1051 (Fla. 1985) is misplaced. In Burr, this Court found proper the admission of evidence from three convenience store clerks who

were robbed and shot by the defendant within a nineteen day period following the robbery/murder of a convenience store clerk for which he was on trial. The evidence clearly showed Burr's intent to rob and eliminate witnesses at convenience stores he robbed. Numerous points of similarities existed and, very importantly, the incidents were all within a very short period of time. No such similarities exist in Appellant's case. The collateral crime was in 1981, the crime for which he was on trial occurred in 1983. The collateral crime involved a kidnapping/sexual battery and verbal threat, but no weapon was ever seen and no physical abuse, other than the forced sex act, was inflicted. As to the crime for which Appellant was on trial, a knife was used to cut the victim, she was badly beaten, bruised, and finally strangled. The two situations only share general similarities, two female victims, same general location. However, there is little evidence that Patricia Nigro's killer was seeking sex.

Appellee's list of fifteen points of similarity ignores substantial differences between the two incidents. As stated in Drake v. State, 400 So.2d 1217, 1219 (Fla. 1980):

> A mere general similarity will not render the similar facts legally relevant to show identity. There must be identifiable points of similarity which pervade the compared factual situations. Given sufficient similarity, in order for the similar facts to be relevant the points of similarity must have some special character or be so unusual as to point to the defendant.

Nothing about the points of similarity between the collateral offense and the crime for which Appellant was on trial

below was of such a special character or so unusual as to point to Appellant. The collateral crime evidence had no relevancy other than to show bad character or propensity.

In light of the circumstantial evidence presented below, the hair analysis which was not conclusive (R.1061), the fact that a witness was 100% positive Appellant was not the person who placed the box in the dumpster (R.821-822, 827), it cannot be said that the admission of the collateral crime evidence was harmless error.

POINT III

THE TRIAL COURT ERRED REVERSIBLY WHEN IT PERMITTED THE STATE TO INTRODUCE INTO EVIDENCE STATE'S EXHIBIT "VVVV", A RIGHT'S WAIVER CARD UPON WHICH APPELLANT HAD AGREED TO SPEAK TO THE POLICE "AT MY DISCRETION".

By introducing evidence of a Right's Waiver Card where Appellant had written he would talk to the police "at my discretion," the State conveyed to the jury that Appellant was fearful of speaking to the police and that he retained the option not to speak with them. By placing Appellant in such a light, the State in effect commented on Appellant's decision to retain the option of exercising his Fifth Amendment rights. The written statement on Appellant's Right's Waiver Card is clearly fairly susceptible as an adverse comment on his desire to maintain his right to refuse to talk with the police. The fairly susceptible standard is still the applicable standard. See, State v. Kinchen, _____ So.2d _____ (Fla. 1985, Case No. 64,043l, Opinion Filed 8/30/85, [FLW 446]. Although recent caselaw has receded from the per se reversible error rule applied in David v. State,

369 So.2d 943 (Fla. 1979); Trafficante v. State, 92 So.2d 811 (Fla. 1957); and Kinchen v. State, 432 So.2d 586 (Fla. 4th DCA 1983). See, State v. Kinchen, supra, the State has not sought to shoulder the burden that the error was harmless beyond a reasonable doubt. See, State v. DiGuilio, _____ So.2d _____ (Fla. 1985), Case No. 65,490, Opinion filed 8/29/85, [10 FLW 430].

The evidence in the case sub judice was not conclusive. Appellant admitted having discarded a stereo box where the victim's body was found. Thus, the identification of his fingerprint on that box was foreseeable and consistent with a reasonable hypothesis of innocence. Appellant discarded the box after having had it in his possession. His fingerprint on the box was certainly to be expected.

One witness, Mark Spinger, testified he saw the man place the stereo box with the body in the dumpster where it was found, and he further testified that he was 100% positive Appellant was not the man who placed the box in the dumpster. (R.821-822, 827)

Further, FBI hair identification expert Douglas Deedrick testified that hair analysis is not a basis for absolute personal identification. (R.1061) Thus, the circumstantial evidence which the State presented was certainly questionable. Therefore, it cannot be said that the introduction of the Right's Waiver Card was harmless beyond a reasonable doubt. See, DiGuilio, supra. The Appellant's conviction should therefore be reversed.

CONCLUSION

On the basis of the foregoing arguments and citations of law, Appellant requests that this Court reverse the Judgment of Conviction and Sentence of Death entered below, and remand with instructions that he be discharged therefrom, or alternatively, he be granted a new trial, or alternatively, that he be sentenced in accordance with the Jury recommendation of life.

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 mail to Robert S. Jaegers, Esquire, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida 33401, this ____ day of October, 1985.

MAX RUDMANN, Esquire