IN THE SUPREME COURT
STATE OF FLORIDA

ABRON SCOTT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 66,422

APPEAL FROM THE CIRCUIT COURT
IN THE SIXTH JUDICIAL CIRCUIT
FOR PINELLAS COUNTY, FLORIDA

BRIEF OF APPELLEE

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SUMMARY OF THE ARGUMENT

The trial court did not abuse its discretion by finding as aggravating circumstances that the instant murder was heinous, atrocious and cruel and committed in a cold, calculating manner. These findings, which are supported by competent evidence in the existing record, should not be disturbed. Cf. Sireci v. State, 399 So.2d 964 (Fla. 1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979).

Assuming arguendo that one or both of the challenged factors is invalid, this cause need not be remanded for resentencing since it is apparent from the trial judge's order that she considered death to be the appropriate penalty in this case. Cf. Thomas v. State, 456 So.2d 454 (Fla. 1984); Kennedy v. State, 455 So.2d 351 (Fla. 1984); Peede v. State, 474 So.2d 808 (1985).

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS HEINOUS, ATROCIOUS AND CRUEL

The findings of the trial judge on aggravating and mitigating circumstances are factual findings which should not be disturbed unless there is a lack of competent evidence to support such a finding. Sireci v. State, supra; Lucas v. State, supra. Sub judice. The trial judge found the aggravating factor set forth in Section 921.141(5)(h) Fla. Stat. 1983 to apply. In other words, the trial judge found the murder to have been heinous, atrocious and cruel. (R.1855-1858) The trial judge stated her reasons for this finding orally at sentencing, noting that the victim in this case was selected at random and stating:

> "They proceeded at this time to beat this individual up. In fact, as I recall the testimony, the individual was beaten up so badly, that he had to be lifted up, picked up, and thrown in the back of the car ... (R.1856)
>
> Now, we have this man being brought from Hillsborough County. He is now in Pinellas County, totally lost. And if intent was to rob him of his possessions, why didn't they leave him alone? Why didn't they just leave him? No, that wasn't good enough. By direct testimony from this defendant's statement, whether intentional or not, this defendant chose to run this man down. And from the testimony -- and although not considering the testimony that came out in the codefendant's trial -- it became apparent in the sentencing phase that at that particular time, the car got stuck on this victim. And he, Scott, proceeded to rev the engine, spin the tires and in effect, just push this man down in the sand where he couldn't breath anymore, and his ribs were crushed, whatever. I can't imagine anything more cruel. And this court

> really can't imagine - I'm very well aware of the cases involving atrociousness. Certainly there are worse homicides. But this defendant had time to think from Hillsborough County clear out to some dark road. And this man couldn't have thought anything other than they were going to kill him, because what other reason would they have to bring him over here? They beat him up again, and all of a sudden that car started to run him down on his body. I can't imagine a crueler way to kill someone." (R.1857-1858)

Appellee is in agreement with appellant's definition of the terms heinous, atrocious and cruel as set forth in State v. Dixon, 283 So.2d 1 (Fla. 1973) cert. denied 416 U.S. 943 (1974). Appellee disagrees with appellant's conclusion that the instant murder was not heinous, atrocious and cruel because the victim may have been unconscious at the time of his death.

There is no evidence that the victim, Carlos Orellana, was unconscious at the time he was run down by appellant. Appellant gave two similar versions of this murder in statements to Detective Halliday and forensic psychologist Linda Appenfeldt. (R.1404-1408, 1675-1676). In those statements, appellant admits beating the victim into unconscious or semi-unconscious in front of a Tampa bar, then kidnapping the victim and transporting him to a secluded area of Pinellas County. (R.1405,1406,1692). The victim struggled when he was taken out of the car so appellant and his co-defendant beat him into submission. (R.1406,1675) Appellant told Detective Halliday that he struck the victim with the car (R.1406) and advised Dr. Appenfeldt that he recalled the victim being pinned under the car and the car being stuck in the sand. (R.1676)

Appellee would submit that foregoing facts amply support the trial court's finding. This Court has indicated that mental anguish suffered by the victim is an important factor when considering this aggravating circumstance. Cf. Jennings v. State, 453 So.2d 1109 (Fla. 1984); Phillips v. State, 476 So.2d 194 (Fla. 1985). In Delap v. State, 440 So.2d 1242 (Fla. 1983), this Court indicated that this factor was properly applied where the victim was kidnapped and beaten. In fact, the beatings themselves, leading up to or perhaps even causing death provide competent evidence that this crime was heinous. Cf. Thomas v. State, supra; Heiney v. State, 447 So.2d 210 (Fla. 1984). It is proper to consider acts committed against the victim leading up to death even though the victim may have subsequently become unconscious. Preston v. State, 444 So.2d 939 (Fla. 2d DCA 1984).

In summary, it is not merely the victim's ultimate suffocation caused by being pinned under the automobile that renders this homicide heinous, atrocious and cruel, but the entire sequence of events leading up to the death. Compare Parker v. State, 458 So.2d 750 (Fla. 1984); Lightbourne v. State, 438 So.2d 380 (Fla. 1983); Delap, supra; Preston, supra. This case may be distinguished from Jackson v. State, 451 So.2d 458 (Fla. 1984) in which the victim lived for several hours but was unconscious after being shot in the back and Herzog v. State, 439 So.2d 1372 (Fla. 1983) in which the victim was in a state of self-induced semi-or unconsciousness at the time she was killed. The trial court did not err in finding the instant murder to be heinous, atrocious and cruel.

ISSUE II

THE TRIAL COURT DID NOT ERR IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE INSTANT MURDER WAS COLD AND CALCULATED

The trial judge also found the aggravating factor specified in Section 921.141(5)(i) Fla. Stat. 1983 to apply, to wit: that the instant homicide was committed in a cold, calculated and premeditated manner without pretense of moral or legal justification. The judge rejected appellant's contention that he did not mean to kill the victim as being unworthy of belief and stated:

> "... I can't imagine what else they were doing when driving from Hillsborough to Pinellas to dump this gentleman out in the middle of nowhere if it wasn't done solely to kill him ...
>
> It was clear that it was cold, calculated. This Court also believes it was premeditated. And certainly, there was nothing put forth to suggest either moral or legal justification for the crime ..."
> (R.1859)

This Court has held that a murder can be both heinous, atrocious and cruel and cold, calculated and premeditated. The cold and calculated aspect of the murder more nearly relates to the killer's intent and state of mind when the murder was committed. The heinous aspect relates more to the manner in which the crime is done - method, i.e., causing the victim unnecessarily, prolonged extreme pain. Combs v. State, 403 So.2d 418 (Fla. 1981); Mason v. State, 438 So.2d 374 (Fla. 1983); Squires v. State, 450 So.2d 208 (Fla. 1984).

Thus, in Mason this factor was found to exist when the murderer broke into the victim's home, deliberately armed himself in her kitchen and proceeded to murder her. Id. at 379. In Card v. State, 453 So.2d (Fla. 1984) this factor was deemed to apply when the defendant kidnapped the victim and transported her to a secluded area before killing her. This Court noted in Card that the defendant had ample time to reflect on his actions before the murder was committed. Id. at 23,24. See also, Jent v. State, 408 So.2d 1024 (Fla. 1981); Combs, supra. In the case at bar, it is evident that appellant also had ample time to reflect on the nature and consequences of his actions before electing to participate in the execution of the victim. Indeed, appellee would submit that the mere fact that an automobile rather than a more traditional weapon was used to effect this crime renders it no less an execution. Cf. Lightbourne v. State, supra. Nor is there any suggestion that the murder was committed in the heat of passion or with any pretense of moral or legal justification. Cf. Mason, supra. The trial judge did not err in rejecting appellant's contention that he did not intend to kill the victim. Intent, being a state of mind, is a factual question which may properly be determined from a defendant's actions. Cf. State v. J.T.S., 373 So.2d 418 (Fla. 2d DCA 1979); State v. West, 262 So.2d 457 (Fla. 4th DCA 1972). In short, the record amply supports the trial court's determination that this crime was cold, calculated and premeditated.

Assuming arguendo that this court rejects the trial court's finding as to one or both challenged aggravating factors, remand

for resentencing is not necessarily required if it can be determined from the record that death is the appropriate penalty and the invalid factors would not alter the trial judge's weighing process. Cf. Peede, supra; Thomas, supra; Kennedy, supra. Sub judice the trial judge found five aggravating factors, three of which are not challenged here, and two mitigating factors to exist, and the court considered appellant's non-statutory mitigating evidence. (R.1864) The jury recommended death by a nine to three vote. (R.342) Under these circumstances, it cannot be said that the mitigating circumstances outweighed the aggravating circumstances properly found. In Kennedy, supra, this Court affirmed the sentence of death after invalidating three of seven aggravating factors found to exist notwithstanding the presence of one mitigating factor. In Thomas, supra, this Court affirmed a death sentence which was imposed over a jury recommendation of life, after rejecting one aggravating circumstance and notwithstanding the fact that two mitigating factors were found to exist. No less than in Kennedy and Thomas, it is clear in the case at bar that death is the appropriate penalty. The trial court's judgment and sentence should be affirmed.

CONCLUSION

Based on the foregoing arguments and authorities, appellee respectfully requests that the judgment and sentence of the trial court 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. Mail to John Thor White, Esq., P.O. Box 10096, St. Petersburg, FL 33733 on this 7th day of January, 1986.

Ann Garrison Paschall
Of Counsel For Appellee