IN THE SUPREME COURT

OF

THE STATE OF FLORIDA

ABRON SCOTT,
APPELLANT,

VS.

STATE OF FLORIDA
APPELLEE.

CIRCUIT CRIMINAL
NOS. 83-9115 &
83-9112

APPEAL NUMBER
66,422

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

APPELLANT'S INITIAL BRIEF

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SUMMARY OF ARGUMENTS

Appellant contends that he is entitled to a resentencing without a jury or alternatively that he is entitled to remand for the purpose of imposing a twenty-five year sentence without parole on his conviction of first degree murder and sentence of death.

This contention is based upon the premise that the trial court improperly found the existence of two aggravating factors, to wit: that the crime was especially heinous, atrocious, or cruel and that the homicide was committed in a cold, and calculated, premeditated manner without pretense of legal or moral justification.

STATEMENT OF THE CASE AND FACTS

Appellant, Abram Scott, was charged by indictment with first degree murder (R. 7) and by information with kidnapping and robbery (R. 9); the charges thereafter being consolidated for trial (R. 47). He was found guilty of all three counts by a jury in the Circuit Court, Pinellas County, Judge Susan F. Schaeffer presiding (R. 304-6). The jury by a 9:3 vote recommended the death penalty (R. 1827). The trial judge ultimately adjudicated the Appellant guilty and imposed the following sentences: the death penalty for the first degree murder count, a consecutive sixty (60) year sentence on the kidnapping count (with a retention of jurisdiction for One-third of the sentence), and a fifteen year sentence on the robbery count to run concurrent with the sentence imposed for kidnapping (R. 1868).

Appellant appeals his adjudication of guilt in each count and the sentences of death and imprisonment imposed. The Supreme Court of the State of Florida has jurisdiction pursuant to Article V Section (3)(b)(1), Florida Constitution.

Testimony and evidence was adduced at trial to the following effect:

On October 26, 1983, a heavy equipment operator

was working on a dirt road in a secluded section of Oldsmar in Pinellas County, Florida. He chanced upon a car jack and a pair of shoes beside the road (R. 1108). Soon after this discovery he noticed a terrible smell in the area (R. 1109). To investigate the smell, he climbed a mound of dirt from which he observed the shoeless body of a dead man in a nearby depression (R. 1110-11). The sheriff's department was summoned to investigate the scene and they took the jack and shoes into custody.

Sheriff's personnel videotaped the scene of the apparent crime. The tape was placed into evidence (R.1133) and was played for the jury (R. 1134). The shoes were likewise admitted into evidence (R.1148). Tire tracks were observed in the area (R. 1155), but they were so weathered as to be of limited evidentiary value.

On October 25, 1983, a resident living near the crime scene found a bank bag carrying personal identification of the victim near a railroad track. She notified the police who collected the items and upon investigation they found that the owner had been listed as a missing person (R. 1190-91).

A sheriff's deputy testified that on October 25th he saw a Toyota weaving upon a road in the city of Dunedin, Florida and that the car fled at a high rate of speed with the deputy in pursuit (R. 1219). The automobile eventually

crashed (R. 1221) with some of the occupants escaping; but one passenger, David Tillman, was captured at the scene (R. 1221).

A computer check revealed that the wrecked vehicle was owned by the victim Carlos Orellana (R. 1223).

Larry Tillman, the passenger arrested at the aforementioned car crash, testified that on October 22nd the Appellant took him for a ride in a Toyota (R. 1248-49). They stopped near a railroad track whereupon the Appellant began throwing things out of the vehicle. Tillman testified that upon inquiry the Appellant stated that the items were gotten from a robbery on Friday nite at Kennedy (boulevard in Tampa) (R. 1250-51). Tillman also testified that they next drove the vehicle to Dunedin where the aforementioned crash took place resulting in his apprehension and the Appellant's escape (R. 1251-52).

A Ms. Phillips testified that she and her brother, the victim, Carlos Orellana, resided together in Tampa in October of 1983 (R. 1262). She further testified that States Exhibit 18, comprised of personal effects, belonged to her brother (R. 1266). She first became aware of that her brother was missing on Saturday, October 22nd (R. 1266). She filed a report with the police (R. 1267) and was notified the following day that her brother's car had been found (R. 1268). By stipulation of the parties the decedant was

identified as her brother, Carlos Orellana (R. 1274-75).

An FDLE analyst testified that she photographed the victim's car and collected samples of suspected human blood therefrom for lab analysis (R. 1282-95). A lab analyst then testified that the blood stains from the car and the victim's blood were both B-type (R. 1299).

A bartender testified that the victim left his bar on West Kennedy Boulevard in Tampa around midnite on Friday, October 21st (R. 1303-05).

Detective Halliday of the Pinellas County Sheriff's Office testified that he flew to Jackson County to transport the Appellant back to Pinellas County. He stated taht after Miranda the Appellant talked about the homicide (R. 1396) and stated that it was an accident and was not meant to be a murder (R. 1399). He further testified that in a subsequent interview Appellant said that he and Amos Robinson met a guy outside a Tampa bar and that they started fighting with him (R. 1404) and furthermore that the victim was rendered unconscious and was thrown into the back of the victim's car which was then driven by the Appellant to Oldsmar (R. 1405). Appellant admitted that the victim struggled as they tried to get him out of the car and that they merely had intended to steal the car and make the victim walk back to Tampa (R. 1406). Appellant then stated that he stopped beating the victim, got into the victim's

vehicle, and intentionally ran into the victim. Appellant claimed that he recalled nothing further at the scene and only recalled driving back to Tampa with Amos Robinson (R. 1407). The detective also testified that the Appellant also stated that personal items of the victim's were thrown out of the car near a railroad track in Tampa (R. 1408).

Dr. Corcoran, MD was recalled to the witness stand after being permitted to listen to Detective Halliday's testimony (R. 1448). The doctor opined that to a reasonable degree of medical certainty the cause of death of Mr. Orellana was the result of the Appellant's activity on the night in question, although he could not identify a specific cause of death because of the decomposition of the body (R. 1449).

The doctor further opined that the cause of death was consistent with asphyxial death (R. 1453) to a reasonable degree of medical certainty (R. 1454). This latter opinion was in response to a question by the Appellee based upon a hypothetical set of facts (R. 1452). The Appellant objected to the hypothetical on the ground that it was not supported by the evidence (R. 1452). The hypothetical was allowed over objection and was repeated (R. 1453).

The doctor, during cross-examination, repeated that he could not determine the exact cause of death (R.

1454-55). He also testified that the unnatural position of the body in the depression also contributed to his findings (R.1461-62).

The Appellee thereupon rested its case in chief (R. 1464).

The Appellant moved for a directed verdict of judgment of acquittal on two grounds: lack of evidence on regard to cause of death and venue and the insufficiency of evidence as to each crime charged (R. 1484-86). The motion was denied (R. 1486).

The Appellant presented no case and final arguments were presented (R. 1508-65).

After verdicts of guilt were received on all counts as charged (R. 1600) the penalty phase was commenced (R. 1615).

During the penalty phase the Appellant's former probation officer testified for Appellee that the Appellant was placed on probation for robbery in 1981 for five years (1622-23) and he related a summary of the facts of that robbery as told to him by the Appellant; namely that the victim in that case was beaten and robbed near the scene of Orellana's kidnapping (R. 1626).

The trial court took judicial notice of the facts and evidence presented during the guilt phase thereby allowing them to be considered in the penalty phase (R.

1632). The Appellee then rested.

Appellant called his father to the stand who testified that the Appellant came from a broken home (R. 1637), that he was a follower (R. 1638), that he was raised in an unstable environment (R. 1640), and that he quit school in the tenth grade (R. 1643).

Appellant next presented testimony from a life long friend who stated that the Appellant was easily disturbed when he abused alcohol and drugs and that he performed poorly in school (R. 1647).

Appellant's brother-in-law testified that he cared for the Appellant for eight months during the latter's teens (R. 1658).

The Appellant's oldest brother testified that the Appellant was taken from his natural mother and placed into foster homes by the court (R. 1664), that he had run away two to three times, and that his mother was an alcoholic (R. 1665). He continued that Appellant was tempermental when he abused drugs (R. 1666).

Appellant then called Dr. Appenfeldt, a psychologist who was qualified as an expert in forensic psychology. She noted that during her interview of the Appellant that he claimed to have been under the influence of alcohol and drugs at the time of the offenses (R. 1675). The Appellant also told her that the victim was hit by his

car and was pinned under it after which help was enlisted from local bar patrons, the car was mobilized, and the Appellant drove away (R. 1676).

Dr. Appenfeldt opined that the Appellant had a mental age of five and one-half years despite a real age of eighteen years and ten months at the time of the interview. She further testified that the Appellant had an impaired ability to appreciate the criminality of his conduct and furthermore that his judgment was impaired by drugs and alcohol that he had ingested at the time of the offense (R. 1680). She characterized the Appellant as a follower (R. 1682) and she related to the jury the Appellant's version of the incident (R. 1690-93). Dr. Appenfeldt also stated that the Defendant did not have the ability to distinguish right from wrong because of his retardation and the influence of drugs (R.1708).

Appellant then rested his penalty phase case in chief (R. 1720).

In rebuttal, Appellee then called Dr. Merin who was qualified as an expert in forensic psychology (R. 1723). Dr. Merin stated that he had examined the Appellant's co-defendant, Amos Robinson, and found him to be a follower (R. 1724).

Appellee then called Dr. Mussenden who was likewise qualified as an expert forensic psychologist (R.

1741). He testified that in regard to social maturity the Appellant tested out as average and not as mentally retarded (R. 1743). He conceded that the Appellant had a severe learning disability (R. 1744). The doctor stated that the Appellant was not under severe mental distress during the crime and was not under the substantial domination of another (R. 1746-47) and furthermore that his ability to appreciate criminality and to conform his conduct to the law was not substantially impaired (R. 1747). The doctor also opined that maturity level was more important than IQ level and that the Appellant was functioning socially within his age level (R. 1748). He also stated that the Appellant may have suffered from brain damage and that he had a poor fund of information and book knowledge and that he was more impulsive that analytic (R. 1756).

The Appellee rested at the conclusion of Dr. Mussenden's testimony (R. 1771).

The Appellee presented sentencing arguments (R. 1786-1801) and the Appellant presented sentencing arguments (R. 1806-16).

The trial court instructed the jury and Appellant's objections to instructions (R. 1773-74) were renewed and denied.

The jury recommended the death penalty by 9:3 vote (R. 1827).

A sentencing hearing was undertaken (R. 1837), with the Appellant being permitted to present argument and testimony in mitigation (R. 1837-43) and the Appellee was likewise permitted oral argument and testimony (R. 1843-1847). The Appellant was then permitted brief rebuttal argument (R. 1847-48).

The trial judge then made her findings of aggravating factors as follows:

The judge found that (1) the Appellant was previously convicted of a crime of violence (robbery) (R. 1851); that (2) the homicide was committed while the Appellant was engaged in, or an accomplice in, the commission of, an attempt to commit, or flight after committing, or attempting to commit the crime of kidnapping (R. 1853); and (3) that the crime was committed for financial gain(R. 1854); and (4) that the crime was especially wicked, atrocious, or cruel (R. 1854 and 1858); and (5) that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R. 1855 and 1859).

The judge then announced her findings as to mitigating factors as follows:

The judge found the existance of the mitigating factor that the Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the

requirements of law was substantially impaired (R. 1862). The court refused to find that Appellant was under the influence of extreme mental or emotional disturbance (R. 1860 and 1863). The judge also found the Appellant's age to be a mitigating factor (R. 1863). The judge further noted that she considered other mitigating factors concerning the Appellant's mental problems, drug problems, and family background (R. 1864).

The trial judge directed that her findings of mitigating and aggravating factors be transcribed and filed as her written findings (R 1871).

FIRST ISSUE ON APPEAL:

WHETHER THE COURT ERRED IN SENTENCING APPELLANT TO DEATH BY IMPROPERLY FINDING THE EXISTENCE OF AN AGGRAVATING FACTOR, TO WIT: THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

By finding that Appellant had committed the homicide in an especially heinous, attrocious, and cruel manner (R. 1858) the trial court erred in applying the legal standard set forth in Section 921.141(h), Florida Statutes as that statute has been construed by appellate decisions.

In State v. Dixon, 283 So. 2d 1,9 (Fla. 1973) the Court provided the following definitions for heinous, atrocious, and cruel:

> Heinous: extremely wicked or evil
> Atrocious: outrageously wicked and vile
> Cruel: designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others

Dixon (ibid at p. (9) went on to state that the crime is heinous, atrocious, or cruel only if the acts are such as to set the crime apart from the norm of capital felonies, in short that the acts evidence a pitiless crime which unnecessarily tortures the victim.

Evidence of this aggravating factor is severely limited in Appellant's case. The victim's body was too badly

decomposed to offer clues even as to exact cause of death (R. 1449). The doctor who did the autopsy did eventually opine that the death was consistent with asphyxial death based upon a hypothetical question which assumed as a fact that the victim was pinned beneath Appellant's vehicle (R. 1453). Appellant objected to the hypothetical question as not being based upon facts in evidence (R. 1453), but the hypothetical was allowed. Assuming arguendo that Appellant's objection was improperly denied, the error was perhaps cured by Dr. Appenfeldt's testimony in the penalty phase wherein she testified that Appellant told her that the victim had been pinned under his car (R. 1676). In any event, there is no evidence that the victim was conscious or even alive at the time that he was hit and pinned by the vehicle.

Dixon (ibid at p. 9) held that the Aggravating factors set out in Section 921.141, Florida Statutes, must be proved beyond a reasonable doubt. In accord please see Cannady v. State, 427 So. 2d 723 (Fla. 1983).

In Halliwell v. State, 323 So. 2d 557 (Fla. 1975) it was held that dismemberment of the body after death was not an aggravating factor contemplated by the legislature. Likewise, in Blair v. State, 406 So. 2d 1103 (Fla. 1981) the victim's body was buried in the yard and a cement slab was poured over it. Again, the Court held that this was not evidence of a heinous homicide. Herzog v. State, 439 So. 2d

1372 (Fla. 1983) held that the method of disposing of the body did not constitute a heinous act and the facts of that case were unclear as to the consciousness of the victim. In Herzog and Appellant's cases there was no evidence of statements or resistance by victim during the homicide and therefore a reasonable inference arises that the victim was at most semi-conscious at the time of death.

In Teffeteller v. State, 439 So. 2d 840 (Fla. 1983) the facts that the victim lived a few hours after being shot and that he knew that his death was imminent was held to not set the case apart from the norm of capital cases. The trial judge in the instant case opined that the victim must have known that he was going to die (R. 1856-57). That finding of fact was not supported by evidence proved beyond a reasonable doubt and does not, as Teffeteller did not, set the case apart from the norm of capital cases.

The trial court obviously considered as an aggravating factor that the victim was pinned beneath his vehicle and was suffocated while the tires were spinning (R. 1857). The trial judge noted in the sentencing phase that certain matters coming out in the co-defendant's trial were merely read by her while reviewing the State's sentencing memorandum and the PSI (R. 1855). Since the fact of suffocation was not proven in Appellant's trial, perhaps the

memorandum and PSI was inadvertantly the source of the trial court's eroneous consideration of that factor. Appellant urges a resentencing hearing without consideration of this aggravating factor or alternatively a remand for sentencing to twenty-five years without parole based upon the erroneous consideration of this aggravating factor.

SECOND ISSUE ON APPEAL:

WHETHER THE COURT ERRED IN SENTENCING APPELLANT TO DEATH BY IMPROPERLY FINDING THE EXISTENCE OF AN AGGRAVATING FACTOR, TO WIT: THAT THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court, during the sentencing phase, found that the homicide was committed in a cold, calculated, premeditated manner (R. 1859). The trial court supported this finding by noting that the victim was transported from Hillsborough County to an isolated part of Pinellas County for the sole purpose of killing him (R. 1859). In Appellant's confession he stated that he merely intended to steal the victim's car and make him walk back to Tampa (R. 1406).

In Cannady v. State, 427 So. 2d 723 (Fla. 1983) the defendant stole money from a night clerk, kidnapped him, drove him into the woods and shot him. The defendant stated he did not mean to shoot him. The Court held that it was error to find that the crime was committed in a cold calculated, premeditated manner. (Cannady cited Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1981), cert. denied ____ U.S. _____ , 102 S.Ct. 2916, 73 L.Ed 2d 1322 (1982) for the rule that this aggravating circumstance ordinarily applies to execution-style murders or contract killings.

In Mann v. State, 420 So. 2d 578 (Fla. 1982) a 10-year-old girl died from a skull fracture and multiple knife wounds; however, the Court held that those facts did not constitute a cold, calculated, and premeditated homicide. A similar holding was rendered in McCray v. State, 416 So. 2d 804, 807 (Fla. 1982) wherein the victim was shot 3 times following threats of death.

In Preston v. State, 444 So. 2d 939 (Fla. 1984) the victim's throat was cut ear to ear but this aggravating factor was deemed not to exist.

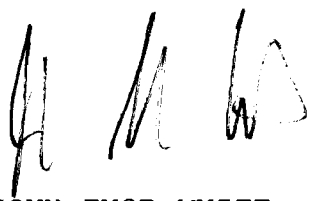
This aggravating factor of premeditation set forth in Section 921.141(i) relates to the killer's state of mind, see Mason v. State,, 438 So. 2d 374 (Fla. 1983) and as noted in Combs v. State, 403 So. 2d 418 (Fla. 1981) (an execution in the woods following a robbery) the Court defined cold and calculated as being over and above the element of premeditation inherent in first degree murder. This definition was reiterated in Jent (supra).

Appellant contends that this aggravating factor was not proven beyond a reasonable doubt and that he should, therefore, be resentenced to twenty-five years without parole or alternatively that this cause should be remanded for a resentencing hearing without consideration of this aggravating factor.

CONCLUSION

For the reasons set forth herein and based upon the authorities cited herein, Appellant requests this honorable Court to reverse his sentence of death and to remand this cause for resentencing or to remand for imposition of a sentence of twenty-five years without parole as to the first degree murder sentence imposed herein.

Respectfully submitted,



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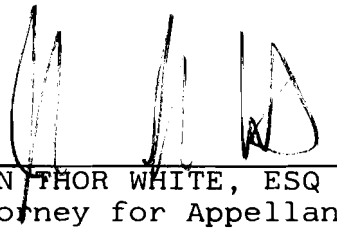
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies hereof have been served upon the Supreme Court of Florida by hand delivery and upon the Hon. Jim Smith, Attorney General (Tampa Office) by US mail on this 20th day of November, 1985.



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