IN THE FLORIDA SUPREME COURT

CLINTON LAMAR JACKSON, :

Appellant, :

vs. : Case No. 66,510

STATE OF FLORIDA, :

Appellee. :

:

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant, Clinton Lamar Jackson, relies on his Initial Brief in response to the State's brief except for the following additions for Issues I, IV-A, IV-B, VI, VII, and VIII.

ISSUE I.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION TO CALL MARSHA JACKSON AS A COURT'S WITNESS WHICH ALLOWED THE STATE TO INTRODUCE EVIDENCE OF JACKSON'S ALLEGED ADMISSIONS UNDER THE GUISE OF IMPEACHMENT WHICH WOULD NOT HAVE BEEN ADMISSIBLE IN ANY OTHER MANNER.

Contrary to the State's assertion, Marsha Jackson's testimony was not adverse to the State's case. At worst, her testimony failed to corroborate that of Freddie Williams'. Futhermore, as explained on pages 18 and 19 of the Initial Brief, Marsha Jackson never denied making a statement to Detective Kappel regarding an admission from Clinton. She merely disagreed with Kappel's interpretation of its truthfulness.

The State's position that Perry v. State, 356 So.2d 342 (Fla.1st DCA 1978) and Erp v. Carroll, 438 So.2d 31 (Fla. 5th DCA 1983) are not pertinent is without merit. Believing that Marsha Jackson had made inconsistent statements regarding Clinton's statement, the prosecutor proffered her testimony. During the proffer, she testified to the version which the prosecutor contended was adverse to his case. At that time,

the prosecutor was not at liberty to produce her as a witness solely to impeach her with prior statements she made to Detective Kappel. Perry prohibits such tactics.

During his penalty phase argument, the prosecutor did argue Kappel's impeachment testimony as substantive evidence. (R1597) He argued that the victim held Nate and that Clinton shot the victim for that reason. That version of the crime was based on the alleged statement Marsha Jackson gave Kappel, not Freddie Williams' statement. (R1200-1201) Williams' version never identified Nate as a perpetrator of the robbery. (R1200-1201)

ISSUE IV-A.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

On page 17 of the State's brief, the argument is made that any homicide which is found to be cold, calculated and premeditated is also heinous, atrocious or cruel. This is an incorrect statement of law. With the addition of the cold, calculated and premeditated aggravating factor, §921.141(5)(i), Fla.Stat., the premeditation variable is no longer relevant to a determination of the heinous, atrocious or cruel factor. Combs v. State, 403 So.2d 418,421 (Fla.1981).

ISSUE IV-B.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSI-

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

The State relies upon Herring v. State, 446 So.2d 1049 (Fla.1984) to support the trial court's finding that the homicide was cold, calculated and premeditated. This reliance is misplaced. Herring is distinguishable.

In Herring, the defendant admitted that he shot the store clerk twice in order to eliminate a witness to the robbery. The second shot was administered after the clerk fell to the floor. The killing was an execution. In the instant case, according to the State's theory, Clinton Jackson shot the victim once in order to free his brother. Only a single shot was fired. There was no evidence that he deliberately chose a vital spot for the shot. The killing was spontaneous and in response to the confrontation. Consequently, Jackson's case is not similar to Herring and falls into the category with White v. State, 446 So.2d 1031 (Fla.1984), Preston v. State, 444 So. 2d 939 (Fla.1984), Maxwell v. State, 443 So.2d 967 (Fla.1983) and Cannady v. State, 427 So.2d 723 (Fla.1983).

ISSUE VI.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN PERMITTING A STATE WITNESS WHO WAS NOT LISTED ON DISCOVERY TO TESTIFY IN REBUTTAL DURING PENALTY PHASE WITHOUT FIRST CONDUCTING A HEARING REGARDING

THE DISCOVERY VIOLATION AND THE PROCEDURAL PREJUDICE SUFFERED BY THE DEFENSE.

Florida's discovery rule applies to rebuttal witnesses in the penalty phase of a capital trial. Fla.R.Crim.P. 3.220; see, Maxwell v. State, 443 So.2d 967,970 (Fla.1983) (where this Court suggests without specifically holding that Fla.R.Crim.P. 3.220 applies to penalty phase). Although the terms of the rule do not specifically include the penalty phase of a capital trial, it does not exclude that proceeding. The rule does mention "information...relevant to the offense charged" Fla.R.Crim.P. 3.220(a)(1)(i), items "which the prosecuting attorney intends to use in the hearing or trial" Ibid. at (a)(1)(xi), and "other discovery...as justice may require." Ibid. at (a)(5). Penalty phase witnesses are certainly relevant to "the offense charged" since the aggravating circumstances and their proof "actually define [the murders]...to which the death penalty is applicable," State v. Dixon, 283 So.2d 1,9 (Fla.1973). Penalty phase proceedings are a "hearing or trial" making the discovery rule applicable. This Court has labeled the proceeding a "post-conviction hearing." Dixon, 283 So.2d at 8. Finally, penalty phase discovery would certainly be included within Fla.R.Crim.P. 3.220(a)(5) requiring such discovery as justice dictates. Notice of the evidence the State intends to use to seek the defendant's death clearly falls within those parameters.

Clinton Jackson's Demands for Discovery included a demand for a list of penalty phase witnesses. (R7-11,27-28,29) Three separate Demands for Discovery were filed. Each re-

quested all information discoverable under Fla.R.Crim.P. 3.220 (R7-11,27-28,29) which is sufficient to include penalty phase witnesses. The first demand also specifically requested any material which might reduce the punishment. (R8)

The discovery violation is not harmless as the State suggests. Because there was no hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla.1977), there is no record upon which the State can rely to show that no procedural prejudice accrued to Jackson as a result of the violation. The prosecutor failed to carry his burden in the lower court. See Wilcox v. State, 367 So.2d 1020 (Fla.1979). A new trial is mandated. Smith v. State, 372 So.2d 86 (Fla.1979). The State's argument in this Court speculates that the defense could have asked for a continuance to investigate further but chose not to do so. There is no record support for this speculation. Since there was no Richardson hearing, there was no discussion or evaluation of the possible remedies for the violation. Indeed, in that fact lies the reversible error now presented to this Court.

ISSUE VII.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF STATE REBUTTAL WITNESS C.D. WILLINGHAM DURING PENALTY PHASE, SINCE HIS TESTIMONY CONSISTED OF HEARSAY FROM AN UNNAMED SOURCE WHICH COULD NOT BE CONFRONTED OR REBUTTED.

The State argues that Jackson's guilty plea in juvenile court to aggravated assault somehow waives his right to

rebut hearsay evidence about the facts supporting that charge when presented in the penalty phase of his trial. This argument is without merit.

Contrary to the State's assertion, Jackson was not seeking to relitigate his guilt. Jackson merely wanted the opportunity to test and rebut the information being presented. His prior guilty plea was not an admission that every single piece of information in the police report was accurate. While the juvenile adjudication was not subject to being contested, the factual circumstances underlying the adjudication were subject to attack. The accuracy of those facts were critical to the weight the jury and judge might attach to the adjudication.

This hearsay evidence which was not subject to being confronted or rebutted should not have been admitted.

ISSUE VIII.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT EVIDENCE OF THE HOMICIDE VICTIM'S CHARACTER AND FAMILY BACKGROUND DURING THE PENALTY PHASE OF THE TRIAL.

This Court has not approved the presentation and use of the victim's character, family background, business practices and standing in the community in determining if a homicide is heinous, atrocious or cruel. The cases upon which the State relies are merely instances where some of that type of information was included in the sentencing order and considered

surplusage. Routly v. State, 440 So.2d 1257 (Fla.1983); Booker v. State, 397 So.2d 910 (Fla.1981); Ruffin v. State, 397 So.2d 277 (Fla.1981). In this case, the evidence was specifically presented, argued and considered in the determination of the heinous, atrocious or cruel factor. It was not considered as minor or insignificant. The trial court erred in allowing the evidence to be presented to the jury and in considering it in sentencing.

The evidence in this case was also materially different than that found in Routly, Booker and Ruffin. In those cases the evidence pertained more to the victim's age, physical condition and the setting of the homicide. Those matters could have some bearing on the question of mental or physical suffering. However, in the instant case the evidence included such information as the victim's generous business practices and the sorrow members of the community were feeling as a result of his death. This qualitative difference in the evidence further removes this case from Routly, Booker and Ruffin.

As an alternative position, the State suggests that if there is adequate evidence besides that in question to support the aggravating circumstance, any error is harmless. This analysis will not work. The crux of the issue is the use of the evidence by both the jury and the judge. The jury recommendation has been tainted by the improper evidence and argument. Consequently, the problem is far different than a trial judge's insertion of extraneous material in a sentencing order when no improper evidence and argument to the jury exists. The error cannot be deemed harmless.

CONCLUSION

Upon the reasons expressed in this Reply Brief and the Initial Brief, Clinton Jackson asks this Court to reverse convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 13th day of November, 1985.

_____
W.C. McLAIN