IN THE SUPREME COURT OF FLORIDA

NATHANIEL JACKSON,

Appellant

vs.

STATE OF FLORIDA

Appellee

Pinellas County Case Nos.
84-965 and 84-7995 CFANO

Appeal No. 66,671

REPLY BRIEF OF APPELLANT

ARTHUR S. CORRALES, ESQUIRE
550 North Reo Street
Suite 300
Tampa, Florida 33609-1013
(813) 873-5120
Attorney for Appellant

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I. THE IMPOSITION OF THE DEATH SENTENCE IS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant in its initial brief cited Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed. 2nd 1140 (1982) which concluded that a violation of the Eighth and Fourteenth Amendments to the United States Constitution occurs when a death sentence is imposed upon an individual who neither kills, attempts to kill, or intends to kill, but who aids and abetts a felony in the course of which a murder is committed by a co-felon.

Appellee, in response, cites Cabana v. Bullock, 38 Cr.L. 3093 (1986) for the proposition that if either a jury, trial judge or state appellate court determines that the defendant killed, attempted to kill, intended to kill or knew lethal force was contemplated, then that decision should not be disturbed. Further, Appellee applied the above principle to the facts in the instant case and concludes that because the trial judge made certain statements that the defendant was an active participant in the crime and knew that a gun would be carried, that his decision is final under Cabana as satisfying the requirements of Enmund.

Such an extension and interpretation of Cabana is erroneous and ill-founded because under Appellee's interpretation, there would be no purpose for appellate courts of review. A trial judge, adopting Appellee's logic, could simply read into the record the necessary facts which would satisfy Enmund and this finding could not and would not be disturbed.

Rather, it is Appellant's contention that Cabana is limited to federal habeas corpus review and has no application to this particular stage of proceedings presently before this court. Cabana stands for the proposition that Enmund findings of fact need not be made by either the jury at the guilt-innocence phase of the trial or the trial judge at the penalty phase,

but may instead be made by a reviewing court; that a federal court, instead of reviewing such a finding in the first instance on habeas corpus review of a state conviction should issue a writ and leave to the state the choice of imposing an alternative punishment or obtaining the requisite determination from its own courts.

Moreover, it is Appellant's contention that the trial judge's statements at most, represent a finding that the defendant, by legal definition, actually killed. We are now at the stage where we are asking this court to review said findings for a final state determination as to whether Enmund has been satisfied for Enmund holds that the Eighth Amendment does more than require that a defendant upon whom the death sentence is imposed be legally responsible for a killing as a matter of state law; it requires that he himself have actually killed, attempted to kill or intended that lethal force be used.

As stated in Appellant's initial brief, the evidence is clear that the defendant neither killed, attempted to kill, or intended that lethal force would be employed. Indeed, the prosecutor in his closing argument conceded that there existed no evidence in the record that Appellant ever attempted to take life or contemplated that life would be taken. As stated in Cabana:

> Enmund, by contrast, imposes a categorical rule: a person who has not in fact killed, attempted to kill or intended that a killing take place or that lethal force be used may not be sentenced to death. (Emphasis added)

Appellant is now asking this court to review the trial court's findings to determine if Enmund has been satisfied. It is Appellant's position that Enmund has not been satisfied. Further, it appears that Appellee does not understand the court's holding in Cabana, but at the very least the interpre-

tation of Cabana offered by Appellee is misplaced and inappropriate at this time.

II. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON THE OPERATION OF FLORIDA'S CAPITAL PUNISHMENT STATUTE REQUIRING REVERSAL OF THE DEATH PENALTY.

Appellee in its answer brief asserts that Appellant had argued in its brief that the trial court should have instructed the jury that the aggravating circumstances must outweigh the mitigating circumstances. In doing so, Appellee has obviously misinterpreted Appellant's argument and therefore, the reference to Kennedy v. State, 455 So.2d 351 (1984), is inappropriate.

The thrust of Appellant's contention is the same as was propounded in Arango v. State, 411 So.2d 172 (Fla. 1982) in that the judge improperly instructed the jury when it stated on two separate occasions that the mitigating circumstances must outweigh the aggravating circumstances in order to justify a life sentence. While it is true that this court in Arango found no violation of the due process clause, it appears that this decision was based, at least in part, on the fact that the trial judge in that case subsequently remedied the infirmed instruction by giving several corrective instructions.

A different result, in all probability, would have been rendered in Arango if, as in the case at bar, no such corrective instructions had been given. This conclusion is borne out and exemplified when the court stated:

> In the present case, the jury instruction, if given alone, may have conflicted with the principles of law enunciated in Mullaney and Dixon..... These standard jury instructions taken as a whole show no reversible error was committed. (Emphasis added) id. at 174.

Because the constitutionally infirmed instructions were given by the trial judge, it is Appellant's contention that such an understanding on the part of the jury was an impermissable allocation of the proper burden of proof.

With regard to Appellee's contention that this issue is not properly before the court because of a lack of an objection to the complained of instructions, Appellant concedes that there are instances wherein a party may not argue on appeal the giving or failure to give a particular jury instruction unless the party objected in the trial court. Appellant argues, however, that this is not such an instance due to the fact that the error complained of is fundamental. The First District Court of Appeals in Timmons v. State, 448 So.2d 1048 (Fla. 1st DCA 1984) stated, when speaking to the lack of an objection by trial counsel that:

> An exception exists where it is shown that the error complained of is fundamental, i.e., error which goes to the foundation of the case or goes to the merits of the cause of action. id. at 1049.

Appellant asserts that nothing can be more fundamental than the determination and ultimate decision to take one's life.

While Appellee cites Foster v. State, 436 So.2d 56 (Fla. 1983) for the proposition that a lack of a timely objection constitutes a failure to preserve the issue for review, it is imperative to note that the complained of instruction in Foster concerned the trial court's instruction on second degree murder during the guilt phase of the trial. Appellant asserts that the instruction during the penalty phase of the trial reaches that level wherein an error in such instances would be fundamental, giving rise to the exception enunciated in Timmons, thereby necessitating that the death sentence imposed be vacated.

III. THE AGGRAVATING CIRCUMSTANCES FOUND BY THE COURT WERE INSUFFICIENT SO AS TO JUSTIFY THE IMPOSITION OF THE DEATH PENALTY.

Appellee asserts that the trial court properly found the aggravating circumstance that the defendant had been previously convicted of another capital felony or of a felony involving the use of threat or violence to the person. In doing so, Appellee cites McCray v. State, 395 So.2d 1145 (Fla. 1980) in which this court did indeed hold this aggravating factor can be proven by either the entry of a plea or a finding of guilt by a jury. Appellee however, fails to discuss the obvious conflict existing between the McCray case and the case of Williams v. State, 386 So.2d 538 (Fla. 1980) cited by Appellant in his initial brief. In Williams, the trial judge in finding this aggravating circumstance to exist, relied on the defendant's pre-sentence investigation report which cited numerous arrests and convictions of several felonies involving the use of force or threat of violence to the person. This court found that the State had failed to carry its burden and that the judge should not have considered this circumstance in his sentence which was based solely on information contained in the pre-sentence investigation report.

Appellant now argues that if there exists a distinction between the facts and circumstances of Williams and those in the instant case, that it is one without a difference. There is no measurable difference between a trial judge considering a single change of plea document standing alone, and considering a pre-sentence investigation report which informs that the defendant had previously been convicted of several felonies.

It is Appellant's contention that a change of plea document is no more compelling than a verified pre-sentence investigation report and hence, an obvious conflict exits between the McCray and Williams decisions. Appellant

now asks this court to resolve this conflict and henceforth, require the State to prove this aggravating circumstance by more competent evidence than a mere unverified change of plea document which cannot be said to satisfy the burden of proving this aggravating circumstance beyond a reasonable doubt. Such a requirement would seem to be mandated in light of the grave sentence sought to be imposed by the State on the defendant.

Appellee concedes that the mere fact of a death does not support the witness elimination aggravating circumstance, but argues that because the defendant had stated that he and his co-defendant waited until the owner of the store was alone, that the basis for a finding of this aggravating circumstance has been established. Such an argument totally ignores the dictates of Menendez v. State, 368 So.2d 1278 (Fla. 1979) and Armstrong v. State, 399 So.2d 953 (Fla. 1981) previously cited in Appellant's initial brief in which this court clearly held that an intent to avoid arrest is not present in the case of a lay witness, when it is clearly shown that the dominant or only motive for murder was the elimination of witnesses. (emphasis added)

It is entirely possible, if not probable that the victim would not have been killed if not for his resistance to the robbery. There were no discussions between the defendant and his co-defendant as to even a possible killing of the victim. Moreover, Jackson had no reason to believe that his co-defendant brother would kill nor did there exist any evidence that he intended to kill when he entered the store with Jackson. Indeed, if Appellee's argument is followed to its logical conclusion, then every robbery where the robbers desire to commit their crime with no witnesses present and a death results, would satisfy the requirements of this particular aggravating circumstance. Such an argument violates the principles

enunciated in Riley v. State, 366 So.2d 19 (Fla. 1978) and every other such case dealing with the subject of this particular aggravating circumstance.

Appellee asserts that the murder in the instant case was especially heinous, atrocious or cruel, and in support thereof argues that the victim was shot directly in line with his heart and lingered in pain for several minutes. This argument is extremely weak in light of the cases previously cited by Appellant in his initial brief. In particular, Kampff v. State, 371 So.2d 1007 (Fla. 1979) where the defendant directed a pistol shot straight to the head of the victim after carefully planning her murder.

In addition, cases cited by Appellee in support of this contention are distinguishable. In Washington v. State, 362 So.2d 658 (Fla. 1978), the defendant shot and repeatedly stabbed four separate victims causing the death of one, blinding one, causing breathing difficulties in another, and rendering the last in a comatose, permanent vegetable state.

In Funchess v. State, 341 So.2d 762 (Fla. 1976), the defendant in a clear effort to accomplish the crime of robbery, systematically stabbed and cut the throats of three people, killing two with the lone survivor being badly mangled.

In Knight v. State, 338 So.2d 201 (Fla. 1976), the victims, husband and wife were each shot through the neck at close range with a rifle. This court found it a close call as to this aggravating circumstance in that death was almost instantaneous as to each victim. The court concluded however that because the victims were under continuous strain for hours preceding the killings and feared for their lives at every instance for such a long period of time, that the crime was particularly cruel, heinous and atrocious.

The facts in the instant case reveal that the victim died from a single gunshot wound to the abdominal area without any additional facts being

present. Such circumstances unquestionably, do not rise to the level required to find the aggravating circumstance of especially heinous, atrocious or cruel.

Appellant has previously conceded in his initial brief that the murder was committed while the defendant was an accomplice in a robbery. It is again asserted under Rembert v. State, 455 So.2d 337 (Fla. 1984) that a single aggravating circumstance, standing alone cannot warrant the imposition of the death sentence.

IV. THE FACTS IN THE CASE AT BAR DO NOT WARRANT THE IMPOSITION OF THE DEATH PENALTY UNDER APPROPRIATE PROPORTIONALITY REVIEW.

In an effort to convince this Court that death is the appropriate sentence, Appellee focuses exclusively on the presence of aggravating circumstances with little importance given to the mandatory proportionality review that is required. The real question presented in this particular point of appeal is whether Appellant's death sentence is warranted in light of other murder cases in which the defendant received life imprisonment which unarguably, is a far more reaching argument than is a mere balancing of aggravating versus mitigating circumstances.

In support of their argument, Appellee cites James v. State, 453 So.2d 786 (Fla., 1984) where this Court found the evidence sufficient to support the jury's findings and affirmed defendant's death sentence.

It is Appellant's contention that the James case is distinguishable from the facts in the instant case in that Joel James was an active participant in two separate criminal episodes; the shooting and robbery of Mr. Satey and the subsequent murder of Mrs. Satey. There is no question but that James contemplated that legal force might be used when he and his co-defendent entered the Satey residence after the already near fatal shooting of Mr. Satey.

The facts in the instant case, however, clearly reveal that the victim was shot in a spontaneous fashion without any forewarning and it cannot be said that Jackson intended or contemplated that legal force might be used or that life might be taken.

Appellee also cites the cases of Hall v. State, 403 So.2d 1321 (Fla., 1981), Ruffin v. State, 397 So.2d 277 (Fla., 1981) and Barclay v. State, 343 So.2d 1266 (Fla., 1977) as examples of equally culpable co-defendants. These cases likewise, are easily distinguishable.

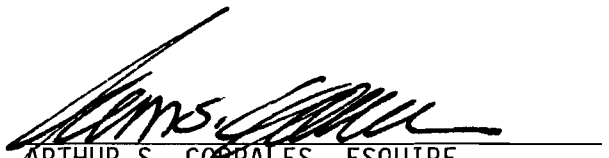
In Barclay, both the defendant and his co-defendants set out on the evening in question with the sole intent to kill. The evidence clearly established that Barclay repeatedly stabbed the victim with a knife and that his co-defendant, Dougan, subsequently executed the victim by shooting him twice in the head. In both Hall and Ruffin, the evidence clearly established that the killing was not spontaneous but was the result of a common scheme in a natural foreseeable sequence. In addition, it is important to note that the relative culpability of each defendant in these cases was difficult to determine because the only evidence that Ruffin was the one who had actually shot the civilian victim came from Hall's self-serving statements to a deputy sheriff.

In the instant case, Nathaniel Jackson had no intent to kill when he entered the hardware store on the date in question. Moreover, the evidence clearly established that Jackson did not kill and did not know a killing would take place until his co-defendant brother shot the victim which acts were precipitated when the victim unexpectedly grabbed him.

When viewing the facts in the case at bar with particular attention being paid to Jackson's individual culpability, and comparing them to the facts in the cases cited by Appellant in his initial brief as well as cases cited by Appellee, it is clear that the penalty imposed upon him is unconstitutionally disproportionate to the crime he committed and his death sentence should be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the OFFICE OF THE ATTORNEY GENERAL, Park Trammell Building, 8th Floor, 1313 North Tampa Street, Tampa, Florida 33602, LARRY SANDEFER, Assistant State Attorney, Post Office Box 5028, Clearwater, Florida 33520, KARLEEN F. DeBLAKER, Clerk of the Circuit Court, 5100 144th Avenue North, Clearwater, Florida 33570; and that the original and seven copies have been mailed to the SUPREME COURT OF FLORIDA, Supreme Court Building, Tallahassee, Florida 32301, this 15th day of April, 1986.



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550 North Reo Street
Suite 300
Tampa, Florida 33609-1013
(813) 873-5120
Attorney for Appellant