IN THE FLORIDA SUREME COURT

HAROLD GENE LUCAS,

Appellant,

v. CASE NO. 67,094

STATE OF FLORIDA,

Appellee.

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

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee will utilize the following record references: R-Record on this appeal, PR-Record on first appeal, RR-Record after first remand.

STATEMENT OF THE CASE

On August 30, 1976, the appellant Harold Gene Lucas was indicted for the first degree murder of one Anthia Jill Piper (Count I); attempted first degree murder of one Terri L. Rice (Count II) and the attempted first degree murder of one Richard Byrd (Count III) (R-549).

Appellant was found guilty as charged on January 14, 1977 (R-683)

Thereafter, the jury recommended the death penalty on the first degree murder count. (R-664-668) The court adjudicated appellant guilty and made its written findings in support of the death penalty and sentenced appellant to death. (R-998-999) Notice of appeal was filed on February 18, 1977. (R-685)

On appeal this court affirmed the conviction, Lucas v. State, 376 So.2d 1199 (Fla. 1979). It also held that the trial judge, in imposing sentencing, had properly considered as aggravating circumstances the fact that appellant had previous, to the sentence in the instant case, been convicted of two separate counts of first degree murder; that the defendant knowingly created a great risk to many persons and that the murder was especially heinous atrocious and cruel. Id. 1152-1153.

This court also rejected the contention that the trial judge had improperly refused to find two mitigating circumstances; viz; (1) that appellant was under extreme mental or emotional disturbance and (2) that he could not appreciate the criminality of his conduct. In rejecting this contention this court agreed that the trial court had considered these circumstances, but was not bound to find them to exist. Id. 1153.

This court did find, however, that the trial judge erred in considering the heinousness and atrociousness of the two attempted murders as an aggravating circumstance. Id 1153. Because of this error this court remanded for re-sentencing, without the benefit of a new sentence recommendation by a jury, in order to have the judge reweigh the aggravating and mitigating factors absent the improper factor Id 153-1154, something that, constitutionally, this court have done Wainwright v. Goode, 78 L.Ed 2d 187 (1983).

On remand appellant filed numerous motions which included: (1) a motion to preclude imposition of the death penalty (R.R. 26-27) (2) motion to permit appellant to present character and background testimony from family members prior to re-sentencing and (R.R. 28-29) (3) a motion to impanel a jury for a new sentencing recommendation. (R.R. 30-31). The lower court denied these motions.(R.R. 73).

The trial judge reweighed and reimposed the death penalty, unfortunately in doing so made the following statement:

> Despite what we have read other places, the Supreme Court did not find fault or claim that this Court erred in considering certain things.
>
> The only thing -- Paragraph 2 of the order entered by this Court, which I wrote, says that each of these offenses was carried out in such a -- I think they enjoyed finding my spelling wrong there -- sadistic fashion as to be especially heinous, atrocious and cruel, and I think they are absolutely correct in that, that that word "each" should not have been there. Frankly, that's about all this whole thing boils down to.
>
> They want to correct the English and spelling more than anything, as I see it.
>
> (RR-53)

On appeal, after remand, this court felt that this statement tended to negate any supposition that the trial judge used reasoned judgment in reweighing and again reversed for ". . . a new sentencing proceeding." Lucas v. State, 417 So.2d 250 (Fla. 1982)

On this second remand appellant, essentially, refiled the same motions he had filed in the first remand. (R-321) Additionally, he filed a motion to allow introduction of statutory mitigation before an advisory jury (R-303) and for the appointment of a toxicologist and psychologist to assist in the preparation of mitigating evidence before an advisory jury, should the court impanel such body. (R-308)

A hearing was conducted at which time counsel argued as to the meaning of this court's opinion in Lucas v. State,

417 So.2d 250 (Fla. 1982), that is, whether the remand was limited to a reasoned judgment re-evaluation of the aggravating and mitigating circumstances presented at trial or whether appellant could present further mitigating evidence. (R-313-348)

The lower court denied all the motions (R-353-356) and on May 8, 1985 re-sentenced appellant to death (R-392-398). The court found one mitigating circumstance:that appellant lacked a significant history of prior criminal activity. It rejected the contention that appellant was under the influence of extreme mental or emotional disturbance or that he could not appreciate the criminality of his conduct.

As aggravating factors the court found that appellant had previously been convicted of two crimes of violence, that appellant created a great risk of death to many persons and that the crime was heinous and atrocious. (R-402-403).

STATEMENT OF FACTS

The facts relating to the murder are as follows:

For sometime prior to the murder appellant had been exhibiting rancour towards the decedent. A week prior the sheriff's office had been called to the Piper residence because of a disturbance appellant was causing. Even when the deputy sheriff asked him to leave appellant refused (R-36-42). Appellant had made numerous threats towards decedent (R-148, 208, 233, 274), apparently because of a belief that she had reported him to the police (R-207).

The threats were such that on the night of the murder the decedent resorted to arming herself and her friends (R-235) and even to hiding her car across the street so that appellant would not know they were home (R-236-279). The three at the house were decedent, Terri Rice (Count II) and Richard Byrd, Jr. (Count III).

But, they made the mistake of deciding to go get the car (R-279). After they got the car Byrd walked back across while decedent and Terri rode together (R-280). At about the time that decedent and Terri had returned, appellant appeared from nowhere and shot decedent. The testimony of both Terri Rice and Richard Byrd at this point is informative and merits repeating herein. First, that of Terri Rice:

> A We came back with the car. Ricky walked across the street. We had come back with the car and Jill had gotten out, then I got out and walked around the back of the car. I turned and looked to my right and I seen somebody standing on the side of the house. At that time I thought that it might have been Ricky, and then I thought no, because Ricky had already gone in the house. And then I seen the gun and I seen Gene shoot it and I seen Jill fall.
>
> Q What did you do?
>
> A I ran past Jill and ran into the house and called the Sheriff's Department.
>
> Q Do you know what -- when you say you saw Gene with the gun and saw him shoot it, can you describe the gun?
>
> A No, I can't.
>
> Q Do you know the difference between a pistol and the rifle?

A Well it was a rifle.

Q Okay. If you would, to the best that you can recollect, tell in detail what happened after you heard the shots, exactly what you did and what you heard and tell it in as much detail as best you can recollect.

A After I had ran into the house, Ricky was standing at the front door. I had told him that Jill had been shot. From there we went into the bedroom where I had got the phone and was calling the Sheriff's Department. We were in there, and I had gotten ahold of the Sheriff's Department and told them what all had happened.

From then I was going to call Jill's parents and I couldn't remember the number, so I called back at the Sheriff's Department to see if they had sent any deputies out yet.

I was -- I heard Jill out in a part of the house and she was crying, screaming, "Gene, why are you doing this, I have never done anything to you." I heard nothing after that. And then the next thing I knew is Gene was coming through the bedroom door. He turned and he put the gun on Ricky and shot him, and I ran in the bathroom.

From there he came in the bathroom and he tripped and fell against the wall. I pushed the gun against his chest and I told him not to shoot me and just to leave and leave us all alone, that we had never done anything to him. And he said, "All right." He said, "Let me go. I will get out of here."

I let go of the gun. He ran out the door and he shot me.

(R-237, 1.4 - 239, 1.2)

Next that of Richard Byrd:

Q Were you carrying the .38?

A Yes, sir.

Q Was Jill carrying anything?

A Yes, sir. She was carrying a shotgun.

Q Did you go with her to get the car?

A Yes, sir.

Q Did she move the car?

A Yes, sir.

Q Where did she place it?

A She moved the car back to the driveway.

Q Can you then tell what occurred?

A Yes, sir. I walked across the road to the Piper residence while Terri and Jill rode together in the car. I went into the house ahead of them to see if anybody had entered while we were gone. I had just gone in the front door and opened the sliding door into the house when I heard a noise. It was three shots. Sounded like firecrackers to me at first. I turned around then and I looked and Terri was standing behind me frozen stiff. And just a couple of seconds, maybe three to four seconds, Jill came running in. She collapsed in front of me on the floor. She was holding onto the bookcase and she said, "That son of a bitch has shot me." I saw two wounds in her back pouring blood.

I then grabbed Terri and we ran to the back of the home and we hid in the hallway to the master bedroom -- between the master bedroom and the bathroom.

I then heard screaming and fighting in the living area of the home. I heard slapping and cussing and screaming, and I could hear begging going on.

I then heard three more shots and there was silence. We were at that time on the phone talking to the police when this silence occurred. I then tried to hang the phone up and tried to quiet Terri down. Terri was very, very frightened and berserk.

There was maybe thirty seconds, I don't know, maybe two minutes of just complete silence. I then heard the bedroom door just cave in with a loud bomb, just come open. I just maybe a few seconds before even realized I still had this pistol in my hand. At the time I stood up and I dropped -- I stood up and there was gun at my stomach. There was -- Gene was standing there holding a rifle across his forearm and another rifle in his hand. I dropped the pistol in the closet and I'm standing by -- I dropped it and I started to say Gene's name and he shot me.

I then heard a ruckus such as a fight or something pertaining -- just going on in the bathroom area or there (indicating). I was completely numb at the time. I looked up and I saw Gene standing outside the bathroom door and I could hear Terri begging him, "God, please, don't shoot me. Please don't kill me", and then I saw Gene shoot through the door of the bathroom. I heard Terri screaming.

At this time Gene turned around and he put a gun to my face. I don't -- I'm not sure if I heard a click or not. I cannot tell you. I was completely numb. Then nothing happened. And I watched Gene kick me. I cannot even tell the place he kicked me. I was watching this, but I could feel nothing. I was completely numb. My whole body was numb.

He then turned and walked out of the room.

(R- 280, l. 1 - 282, l. 14)

The decedent was found in her front yard, dead (R-48). An autopsy revealed five (5) different sets of projectiles

at different sites in the body (R-121 - 137). The fatal wound was the one on her left forehead (R-135). It was the opinion of the medical examiner that this shot occurred while the decedent was lying on her back (R-142) and that a person with such a wound could not move more than two or three feet (R-145).

SUMMARY OF ARGUMENT

The lower court complied with this court's two previous mandates in refusing to impanel a jury and to allow appellant to present further mitigating evidence.

Appellant's sole justication for presenting further mitigating evidence is that at trial statutory mitigating evidence was inadequately presented and that his trial counsel was under a misapprehension that he could not present non-statutory mitigating. The first is governed by Hallman v. State, infra and the second by the fact that it is a matter for post conviction relief.

That there was a great risk to many persons is the law of this case. Even if not this court can reweigh the aggravating and mitigating factors, absent the improper one and affirm the death sentence.

The sentence of death in the instant case is not disproportionate to the crime committed.

ARGUMENT

ISSUE I.

THE TRIAL COURT ERRED IN NOT ALLOWING LUCAS TO PRESENT ADDITIONAL EVIDENCE TENDING TO PROVE THE EXISTENCE OF STATUTORY MITIGATING CIRCUMSTANCES.

ISSUE II.

THE TRIAL COURT ERRED IN NOT ALLOWING LUCAS TO PRESENT EVIDENCE OF HIS CHARACTER AND BACKGROUND AS NONSTATUTORY MITIGATING FACTORS.

ISSUE III.

THE TRIAL COURT ERRED IN REFUSING TO APPOINT A TOXICOLOGIST AND A PSYCHOLOGIST FOR THE PURPOSE OF ASSISTING LUCAS IN THE PREPARATION AND PRESENTATION OF STATUTORY AND NONSTATUTORY MITIGATING EVIDENCE.

These three issues hinge, at least in part, on an interpretation of this court's opinion in Lucas v. State, 417 So.2d 250 (Fla. 1982). When appellant was re-sentenced on the first remand appellant asked to present additional mitigating evidence before another jury. The trial judge rejected this request and this court affirmed as to that issue stating:

> We do not fault the trial judge for following the letter of our mandate in this regard

Id. 252

While this court did remand it did so only for the purpose of having the trial judge exercise reasoned judgment in re-evaluating the factors.

Certainly, if this court had intended that on remand the trial judge allow appellant to present further mitigating evidence it would have explicitly said so because appellant on appeal was complaining about that very issue and Justice McDonald in concurring, called to this court's attention the fact that there was no direction to consider the defendant's

background and character in mitigation.

Since this court did not reverse on the issue of re-submission of mitigating evidence and since it did not specifically direct the lower court to allow appellant to present further testimony the same holds true with respect to this remand as with the last: the trial judge cannot be faulted for following the letter of the court's mandate.

Under issue one appellant argues that he should have been allowed to present further evidence to the circumstance of extreme mental or emotional disturbance. He recognizes that such evidence was presented and rejected at trial but contends it ". . . was inadequately proven" (appellant's brief p. 13).

He did not bless the lower court or us with any information as to what further evidence he could have presented towards proving this factor except to say that he needs the appointment of two experts for the development of such evidence (R-318). He admitted below that a psychiatrist had already testified at the penalty phase. (R-319). Essentially what he is saying is that he wants to try and try again to prove what he couldn't prove before.

Appellant relies on Mann v. State, 420 So.2d 578 (Fla. 1982) and 453 So.2d 784 (Fla. 1984) in support of his argument that everytime this court orders a remand for re-sentencing the defendant should be allowed to relitigate mitigating evidence. As appellant states, in Mann this court reversed for a new sentencing proceeding because the sentencing judge had, among other things, considered a Mississippi burglary

conviction as a crime of violence, since burglary is not a crime of violence on its face. On remand the state introduced the indictment to show the burglary included an assault.

While appellant fails to see the distinction there is one. The Mann the reversal was predicated on the very matter which the trial court dealt with on remand. Here there was no nexus between the object of the remand and the supplemental mitigating evidence which appellant sought to produce. In the first remand the trial court was to reweigh absent the improper aggravating circumstance. In the second the court was to use reasoned judgment in reweighing.

A mandate is nothing more than a specific application of the doctrine, commonly know as the law of the case. City of Cleveland Ohio v. Federal Power Commision, 561 F.2d 344 (D.C. Cir. 1977). In order to ascertain what was the judgment of the appellate court it is necessary to consult the opinion. Cherokee Nation v. Oklahoma, 461 F.2d 674 (10th Cir. 1972). In the instant case if one consults the first opinion one finds the issue with respect to those statutory mitigating circumstances encompassed in Florida Statutes 921.141(6)(b) and (f) have been settled.

What appellant seeks here is akin to newly discovered evidence and newly discovered evidence should be disallowed with respect to the sentence unless it is such as would have precluded entry of the sentence. Hallman v. State, 371 So.2d 482 (Fla. 1980); or unless that court has reversed and remanded

on that specific issue; or unless that mandate of this court calls for an entirely new sentencing proceeding.

Appellant attempts to justify his contention that he should be allowed to present further mitigating evidence by arguing that his trial lawyer had mistakenly relied on Cooper v. State, 336 So.2d 1133 (Fla. 1976), believing that the mitigating circumstances were limited to those enumerated in the statute. (appellant's Issue II).

Aside from the fact that he raised this issue on the last appeal we would point out that this is a matter for post conviction relief. What his trial lawyer believed or did not believe we cannot profess to know and we will never know until we have his statement under oath. In both this and the first remand appellant made the assertion, but neither time was it supported by any facts or affidavit of counsel. This was argued by the state below (R-337-338) and is argued here.

Little need be said as to the necessity for the appointment of a Toxicologist and Psychologist. Appellant has yet to demonstrate what they could add to what was said by the psychiatrist at trial. Regardless, if this court rules that the lower court did not err in refusing to permit further evidence towards proving appellant was under extreme mental or emotional disturbance or could not appreciate the criminality of his conduct this issue (appellant's Issue III) is moot.

ISSUE IV.

THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE CREATED A GREAT RISK OF DEATH TO MANY PERSON.

Regardless what this court may have said in subsequent opinions the law of this case is that appellant created a great risk of death to many persons. That is the judgment of this court, Hallman, and the lower court was powerless to make a contrary determination. In this case three attempted murders (one successful) occurred, within seconds of each other. In Lucas v. State, 376 So.2d 1149 (Fla. 1979) this court specifically held that these acts were the type of acts comtemplated by Florida Statues 931.141(5)(c). One thing is certain. This court's Lucas interpretation of that factor is much more restrictive than has been constitutionally allowed. See Alabama v. Evans, 73 L.Ed 2d 921 (1983).

Even were this court to determine that its subsequent definitions of that factor render it inapplicable in this case neither reversal nor remand is necessary. Contrary to what this court may have implied in Brown v. State, 392 So.2d 1327 (1981) this court may, constitutionally, reweigh and approve a sentence of death, after exclusion of improper factors as long as it reweighs on evidence appearing in the record of the cause. Wainwright v. Goode, 78 L.Ed 2d 187 (1983).

ISSUE V.

THE SENTENCING JUDGE ERRED IN NOT REQUIRING THE PRESENTATION TO LIVE TESTIMONY AS TO AGGRAVATING AND MITIGATING CIRCUMSTANCES BEFORE REIMPOSING A DEATH SENTENCE, SINCE HE WAS NOT THE ORIGINAL SENTENCING JUDGE AND NEVER HAD THE OPPORTUNITY TO WEIGH THE DEMEANOR AND CREDIBILITY OF THE WITNESSES.

While, as appellant says, reading a cold transcript may not be a substitute for hearing live witnesses, substitution of a deceased judge by one who has familarized himself with the case is permissible Fla Rule Crim Proc 3.231.

ISSUE VI.

THE TRIAL COURT ERRED IN REFUSING TO IMPANEL A NEW JURY FOR THE PURPOSE OF OBTAINING A NEW SENTENCING RECOMMENDATION, BECAUSE THE ORIGINAL JURY WAS ERRONEOUSLY NOT PRESENTED WITH VALID MITIGATING EVIDENCE, AND WAS ERRONEOUSLY PRESENTED NONSTATUTORY AGGRAVATING EVIDENCE.

Most of what need be said concerning this issue has already be said in response to issues I, II and III. As stated therein appellant has failed to adequately allege that his trial counsel labored under a misapprehension of the law and, even if he did, it is a matter for post convictions relief.

ISSUE VII.

THE TRIAL COURT ERRED IN SENTENCING HAROLD LUCAS TO DEATH BECAUSE SUCH A SENTENCE IS DISPROPORTIONAL TO THE CRIME HE COMMITTED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This issue was also previously disposed of by the court in Lucas v. State, 376 So.2d 1149 (Fla. 1979). If this court would have thought the sentence in this case disproportionate to the crime it would reversed on that basis and finally ended the matter.

Moreover, appellant attempts to categorize this as a family squabble. Nothing could be further from the truth. His victim was a sixteen year old girl that he stalked until he finally caught her and her friends, killed her and attempted to kill her friends.

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities the judgment and sentence should 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: W.C. McLain, Assistant Public Defender, Chief, Capital Appeals, Hall of Justice Building, P.O. Box 1640, Bartow, Florida, 33830, on this 14 day of November, 1985.

OF COUNSEL FOR APPELLEE.