IN THE SUPREME COURT OF FLORIDA

KAYLE BARRINGTON BATES,

Appellant,

v.

CASE NO.: 67,422

STATE OF FLORIDA,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Kayle Barrington Bates, the criminal defendant below, will be referred to herein as Appellant. The State of Florida, the prosecution below, will be referred to herein as Appellee.

The record on appeal consists of one record volume and one transcript volume, both of which are sequentially numbered. Citations to the record on appeal will be indicated parenthetically as "R" with the appropriate page number(s).

Citations to Appellant's initial brief will be indicated parenthetically as "AB" with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Appellee rejects Appellant's Statement of the Facts (AB 5-7) as irrelevant inasmuch as the matters set forth therein pertain to Appellant's conviction which has been affirmed by this Court and the establishment of aggravating circumstances which this Court has already approved.

Appellant, in his Statement of the Case, states that "[t]he court made no mention in the order of the mitigating evidence Bates had presented at the resentencing hearing." (AB 4). While it is correct that the trial judge did not specifically refer to the testimony of any of Appellant's new witnesses, the order does contain a recitation to the effect that the trial judge had considered all the evidence in the case concerning mitigating circumstances (R 41). With the foregoing clarification, Appellee, for purposes of this appeal, accepts as accurate, Appellant's Statement of the Case (AB 2-4) and will supplement same with specific citations to the record during the course of argument where resolution of the questions raised herein so require.

SUMMARY OF ARGUMENT

Appellant seeks reversal and remand of this cause claiming, essentially, that the trial court erred as a matter of law and fact in not considering the mitigating evidence presented at his resentencing hearing. Appellee first argues that since the cause was remanded to the trial court just for a reweighing of the valid aggravating circumstances against the mitigating evidence instead of a new sentencing hearing, Appellant's claim should be rejected because the trial judge was not required to permit new mitigating evidence to be put on and if put on, he was not required to afford it any weight as mitigating circumstances.

Appellee alternatively argues that Appellant's suggestion that the trial judge did not consider his mitigating evidence is clearly refuted by the record and therefore leaves him without any basis to rely on Lockett v. Ohio, infra and Eddings v. Oklahoma, infra, as controlling the disposition of this cause. Appellee further argues that Appellant's real claims, going to the trial court's treatment of expert testimony and the trial court's failure to find mitigating circumstances urged by Appellant are devoid of merit and accordingly are not grounds for reversal.

ARGUMENT

ISSUE

THE TRIAL JUDGE'S TREATMENT OF EXPERT TESTIMONY, HIS FAILURE TO FIND MITIGATING FACTORS URGED BY APPELLANT, AND HIS CONCOMITANT REIMPOSITION OF A SENTENCE OF DEATH WAS NOT ERROR. (Restated by Appellee.).

Appellant, claiming that the trial court erred as a matter of law and fact in not considering the mitigating evidence presented at his resentencing hearing, seeks reversal of his death sentence and remand of the cause either for yet another sentencing hearing or with instructions to impose a sentence of life without the possibility of parole for twenty-five years. In support of his position, Appellant advances a host of arguments, none of which compel awarding him the relief he seeks.

Initially, Appellee notes that the trial judge, in an abundance of caution, held a sentencing hearing where Appellant was permitted to offer evidence in mitigation (R 63). But, since this Court vacated Appellant's original death sentence and remanded the cause to the trial court for a reweighing of the valid aggravating circumstances against the mitigating evidence, Bates v. State, 465 So.2d 490,493 (Fla. 1985), as opposed to a remand for a new sentencing hearing, Appellee submits that the trial judge was not required to provide Appellant the opportunity to put on mitigating evidence and in any event was not required

to give it weight as mitigating circumstances. Mikenas v. State, 407 So.2d 892 (Fla. 1981); Mann v. State, 453 So.2d 784 (Fla. 1984).

In Mikenas, this Court remanded the case to the trial court for resentencing without further deliberations by a jury. The trial judge denied the defendant's Motion for Evidentiary Hearing and Advisory Sentence by Jury and subsequently resentenced him to death. On appeal to this Court, the defendant argued among other things, that the trial court erred in failing to consider and weigh evidence of statutory and non-statutory mitigating factors. This Court rejected the defendant's argument holding:

> In relation to defendant's second point, defendant argues that the new testimony heard by the court was not considered properly in its findings. The testimony heard consisted of two psychologists concerning the possibility of defendant's rehabilitation and a minister concerning his alleged progress in religion. Their testimony was not considered as a mitigating factor by the court. The testimony was apparently permitted by the trial court in an abundance of fairness to the defendant, but the court was not required to give it weight as a mitigating circumstance.
>
> The facts herein are similar to those in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), a death sentence case where we remanded for resentencing because of an apparent noncompliance with guidelines announced in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Upon remand, the trial judge refused to

> take testimony from prison inmate character witnesses. In upholding the trial court's denial of issuance of subpoena for this purpose, we stated that appellant had been afforded ample opportunity to present evidence in mitigation in the original sentencing proceeding. The same reasoning applies here.

Id. at 893,894. Taking a somewhat different posture, the defendant in Mann, claimed that the State could not present additional evidence at resentencing. This Court disagreed, holding:

> Our remand directed a new sentencing proceeding, not just a reweighing. In such a proceeding both sides may, if they choose, present additional evidence. [Emphasis added.]

Id. at 786. Since this Court remanded the cause sub judice just for a reweighing, it is evident, from this Court's language in Mann and Mikenas, that Appellant should not have been permitted to put on additional mitigating evidence, but having done so, said evidence was not entitled to weight for purposes of proving up mitigating circumstances. Consequently, Appellant cannot be heard to assert as error the trial judge's alleged failure to consider evidence which he was not required to permit being put on and if put on, was not required to afford any weight.

While strenuously maintaining that Mikenas and Mann mandate affirmance of this cause, Appellee alternatively argues that Appellant's claim is without merit.

Appellant has structured his claim in terms of the trial

judge's not considering the evidence he put on in mitigation, evidently for the purpose of bringing this cause within the purview of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) which stand for the proposition that the State may not by statute preclude the sentencer from considering any mitigating factor, nor may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. The instant record belies Appellant's claim.

The trial judge, after hearing the testimony of the witnesses and argument of counsel, commented:

> I was a little disappointed in Dr. McMann. First of all, I think her view of the death penalty somehow colors her objectivity in the matter. Secondly, I would think that any expert in that field would want to acquaint herself thoroughly with the facts of the case, including coming and looking at the evidence introduced at trial and this sort of thing. She said she contented herself with briefs filed, certain other papers and then in talking to Mr. Bates. I would have hoped that she had made a rather thorough basis for her opinion.

(R 163). Additionally, the trial judge's written sentencing order contains the following statements:

> The Court is well aware that the procedure to be followed is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment and weighing process as to what factual situations require

the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

* * * *

After studying, considering and weighing all the evidence in the case, the Court makes the following findings of fact as to the mitigating circumstances.

The Court has taken into account the testimony of the defendant and the defendant's father. The Court finds that the defendant has no significant history of prior criminal activity. The Court has considered all the possible mitigating circumstances listed under Florida Statute 921.141(6) and any others that might apply. The Court finds, however, that the testimony and circumstances do not support any other mitigating circumstances. Even if the Court determined that each mitigating factor raised by the defendant had been established, that would not outweigh the overwhelming evidence of aggravating circumstances established by the testimony in this case.

* * * *

The Court is of the opinion that the facts suggesting a sentence of death for the commission of this murder are so clear and convincing that no reasonable person could differ. The aggravating circumstances were proved beyond a reasonable doubt and there are not sufficient mitigating circumstances to outweigh the aggravating circumstances. Therefore, the Court finds that the advisory sentence of the jury should be followed and the death sentence should be imposed upon the defendant. [Emphasis added.]

(R 39-42). Appellee submits that the foregoing record excerpts

clearly demonstrate that the trial judge considered all the mitigating evidence put on by Appellant, including the testimony of his expert, and found it qualitatively insufficient to establish any additional statutory or non-statutory mitigating circumstances. The fact that the trial judge didn't find the mitigating circumstances proposed by Appellant does not mean that he didn't consider the evidence as this Court recognized in Riley v. State, 413 So.2d 1173 (Fla. 1982), holding:

> We reject Riley's contention that the trial judge failed to consider certain evidence introduced by Riley during the resentencing proceeding to demonstrate nonstatutory mitigating factors. The trial judge expressly stated that he considered all the testimony and evidence presented. Furthermore, there is no indication from the record that he limited his consideration of mitigating factors to only those which are statutorily enumerated. Because he failed to find the mitigating factors which Riley urged does not mean that he did not consider the evidence. It lies within his province to decide whether a particular mitigating circumstance in sentencing is proven and the weight to be given to it. Smith v. State, 407 So.2d 894 (Fla. 1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979). Here, we find no error in his decision.

Id. at 1175. Thus, it is readily apparent that Lockett v. Ohio, supra and Eddings v. Oklahoma, supra, are not involved in the disposition of this cause. At this point, the real nature of Appellant's claim comes to light. He is merely taking issue

with the weight the trial judge afforded the testimony of his expert and the trial judge's failure to find the mitigating circumstances Appellant proposed on the basis of the testimony of his expert and other witnesses who testified on his behalf. Neither of these perceived "errors" constitute grounds for reversal of this cause.

Concerning the trial judge's treatment of the testimony of Appellant's expert, Appellant makes much of the fact that her testimony, going to the statutory mitigating circumstances set forth in Florida Statutes § 921.141(6)(b) and (f), was uncontradicted (See AB 25,26). Evidently, Appellant is of the view that uncontradicted expert testimony is binding upon the trier of fact--in this case, the trial judge. Appellant is mistaken. Expert testimony, like the testimony of any witness, is not binding on the trier of fact even when that testimony is uncontradicted. The jury is free to weigh an expert's testimony and may reject it. State v. Ward, 374 So.2d 1128,1130 (Fla. 1st DCA 1979); Nettles v. State, 409 So.2d 85,88 (Fla. 1st DCA 1982), pet. for rev. den., 418 So.2d 1280 (Fla. 1982); Cronin v. State, 470 So.2d 802,804 (Fla. 4th DCA 1985). See also Instruction 2.04(a), Florida Standard Jury Instructions In Criminal Cases, Second Edition, which provides in pertinent part: "Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony."

The particular expert testimony Appellant refers to as

having established the aforementioned statutory mitigating factors is the following:

> Q. Would you say that Mr. Bates was under the influence of an extreme or significant emotional disturbance?
>
> A. You mean at the time?
>
> Q. At the time.
>
> A. I have to say that based on what my understanding of his behavior was, the act, itself, I would have to say yes.
>
> Q. Would you say that the capacity of Bates to appreciate the criminality of his conduct or to the conformance [sic] to the requirements of law was substantially impaired?[1]
>
> A. Yes. All of these are within a reasonable degree of psychological probability.

(R 85,86; See also AB 25,26). In essence, Appellant's expert was of the opinion that the fact that Appellant had committed the crime established the two statutory mitigating circumstances in question. Appellant should not be dismayed by the trial court's rejection of this "expert testimony" since this Court found similar logic to be flawed in Holston v. State, 208 So.2d 98 (Fla. 1968), where it held:

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[1]Earlier Dr. McMahon testified that "Things are either right or wrong. There's very little gray in Mr. Bates' life. Black or white; right or wrong." (R 77).

> It is argued in appellant's behalf that he was a homosexual pedophile whose crimes "were bizarre because after committing homosexual acts upon youngsters of his own male gender he then took their lives." It is asserted "that no sane individual would commit a homosexual act and then kill the victim out of a sense of guilt." This is an argument we reject. The logic is obviously faulty for to follow it to conclusion would mean that the more heinous the commission of a given crime the more likelihood the perpetrator was so crazy he should be set free.

Id. at 99. See also Card v. State, 453 So.2d 17,24 (Fla. 1984), cert. den., 105 S.Ct. 396, where this Court rejected the appellant's argument that the trial judge failed to give proper weight to a psychologist's testimony that was offered in mitigation.

As noted above, in addition to Appellant's complaints regarding the trial judge's treatment of Dr. McMahon's testimony, he challenges the trial judge's failure to find mitigating circumstances he feels were established by her testimony and the testimony of other witnesses concerning his childhood, his military record, his family background, and his performance as a trustworthy employee (See R 130-145). This Court rejected a similar claim in Porter v. State, 429 So.2d 293 (Fla. 1983), holding:

> Porter contends the court erred in not finding the following as mitigating circumstances: Porter's age; his being married with two small children; no significant history of prior criminal

> activity; and his employment history. There is no requirement that a court must find anything in mitigation. The only requirement is that the consideration of mitigating circumstances must not be limited to those listed in section 921.141(6), Florida Statutes (1981). What Porter really complains about here is the weight the trial court accorded the evidence Porter presented in mitigation. However, "mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence." Quince v. State, 414 So.2d 185,187 (Fla. 1982). [Footnote omitted.]

Id. at 296. In so ruling, this Court noted that Porter had been allowed to put on more mitigating evidence at resentencing and concluded that the trial court did not restrict the presentation of mitigating evidence, but merely found that the evidence presented carried little or no weight in mitigation. Id. at 296, n.2. No different result should obtain here. The simple fact of the matter is that the trial judge is not obligated to find mitigating circumstances. Suarez v. State, 11 F.L.W. 1,4,5 (Fla. Dec. 19, 1985). It is within the province of the trial judge to decide whether a particular mitigating circumstance has been proven and the weight to be given it. Toole v. State, 10 F.L.W. 617,618 (Fla. Nov. 25, 1985); Smith v. State, 407 So.2d 894,901 (Fla. 1981), cert. den., 456 U.S. 984 (1982). Reversal is not warranted simply because an appellant draws a different conclusion. Stano v. State, 460 So.2d 890,894 (Fla. 1984).

Briefly summarized, Appellant was not entitled to put on new evidence in mitigation at resentencing and, even though permitted to do so, said evidence was not entitled to any weight as mitigating circumstances. Thus, Appellant's claim concerning the trial judge's alleged failure to consider mitigating evidence is totally meritless. In any event, Appellant's attempt to bring this cause within the purview of Lockett v. Ohio, supra, and Eddings v. Oklahoma, supra, was fruitless, being totally refuted by the record, and his complaints going to the trial judge's treatment of Dr. McMahon's testimony and the trial judge's failure to find certain mitigating circumstances are uncompelling and accordingly do not warrant reversal of this cause.

CONCLUSION

Based upon the foregoing argument and the authority cited herein, Appellant's death sentence should be affirmed.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was forwarded to David A. Davis, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, on this 31st day of January, 1986.

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