IN THE SUPREME COURT OF FLORIDA

HOWARD VIRGIL LEE DOUGLAS,

Appellant,

v. Case No. 67,603

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

RICHARD W. PROSPECT
ASSISTANT ATTORNEY GENERAL
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

AUTHORITIES CITED

STATEMENT OF THE CASE

While Douglas' statement of the case is accurate as far as it goes, we provide the following enhancement thereof in response to various statements made in his brief which indicate a lack of understanding of the relationship between state and federal courts in a case such as this.

Contrary to Douglas' assertions, the original sentence of the trial court which was affirmed and mandated by this court has not been "reversed" by any court. The only thing reversed in this case was the judgment of the United States District Court which determined that Douglas' claim of ineffective assistance of counsel was insufficient to merit federal habeas corpus relief. See, Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983).

That specific judgment of the court of appeals was vacated by the Supreme Court and remanded for further consideration. Wainwright v. Douglas, ___ U.S. ___, 104 S.Ct. 3575 (1985). On remand, the court of appeals adhered to its previous decision. Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984). The state again petitioned for a writ of certiorari but this time, the petition was denied. Wainwright v. Douglas, ___ U.S. ___, 105 S.Ct. 1170 (1985).

As a consequence, the operative judgment of the federal court was that unless the State of Florida provided a new sentencing hearing, the United States District Court would issue the writ and thereby ordering Douglas to be discharged. The basis of this writ, had it been issued, would have been that Douglas' Sixth Amendment right to effective assistance of counsel

was violated because of his trial counsel's failure to present any mitigating evidence or, assuming no mitigating evidence could have been produced, by "emphasizing to the ultimate sentencer that the defendant [was] a bad person or that there [was] no mitigating evidence." 714 F.2d at 1557.

Although federal courts have the power to issue writs of habeas corpus upon a finding of a deprivation of a federally protected right, they do not "reverse" either state court judgments or, as in this instance, an affirmance thereof by this court. The only courts that can "reverse" a judgment of a state court are this court and the Supreme Court. Federal courts, sitting in a habeas corpus capacity, can only issue a writ directing a given state prisoner to be discharged from custody.

As a practical matter, experience teaches that federal courts merely announce their intentions to issue the writ unless the state affords the incarcerated person some form of judicial redress. In this case, the remedy was a new sentencing hearing which had as its obvious purpose, affording Douglas the right to be represented by effective assistance of counsel, that is, counsel who could investigate and present evidence in mitigation, if any, and one who would not in any way negatively influence the utlimate sentencer.

In sum, this case is here because the state elected to provide Douglas the rights the federal court said it deprived him rather than suffer the issuance of the writ of habeas corpus. Theoretically, the judgment and sentence of the trial court is as valid today as it was when this court's mandate issued. In other

words, the business at hand is appellate review of the sentence imposed, and we submit that the review ought to be considered in light of and response to the only reason a "new" sentence was imposed in the first place.

SUMMARY OF THE ARGUMENT

In the opinion of the federal court of appeals, appellant's attorney rendered ineffective assistance of counsel by failing to present evidence in mitigation at the sentencing hearing or alternatively, in the absence of such evidence, by improperly influencing the sentencing judge. In response to this determination, the state afforded appellant a new sentencing hearing so that the deficiency surrounding the presentation of mitigating evidence could be satisfied. Appellant's motion to preclude a reading of the trial transcript had, as its obvious purpose, a de novo determination of aggravating evidence, a matter left undisturbed by the federal courts. Such evidence was previously considered and approved by this court. Any attempt to "re-determine" these factual findings would have been an improper exercise abrogating the law of this particular case. Appellant's attempt to test memories and testimony relating to events which occurred over thirteen years ago was something outside the scope and purpose of the recent sentencing hearing. The reading of the transcript sufficiently prepared the judge with the facts of the case. Imposition of sentence after reviewing the facts was an original proceeding and not one representing some sort of appellate review. There is no indication that the reading of the transcript entailed any demeanor evaluation. Such evaluation had already been accomplished by the jury. No request was made for the original sentencing judge to preside.

The cold, calculated and premeditated aggravating factor, as well as any other aggravating factor, is not subject to waiver by

a capital defendant. Although that factor was not in existence at the time of the original trial, this court's review of the facts and sentence indicates that even had it been, it would have been properly found then. Even if this factor were not considered by the trial court, the findings in fact in support of sentence indicate that the factor of heinous, atrocious and cruel would have nonetheless outweighed the non-statutory mitigating circumstances.

That the capital murder was committed in a heinous, atrocious and cruel manner has previously been found and approved by this court. That the capital murder was committed with the heightened premeditation required by the new statutory factor is fully supported by the facts of the case and was implicitly recognized by this court in review.

Although the new sentencing hearing produced a finding of two non-statutory mitigating circumstances, these circumstances were not sufficiently weighty to have caused the recommendation of life to be any more reasonable today than it was over ten years ago. The trial court properly found that such a recommendation was unreasonable and thus properly overrode the jury recommendation in this case. The sentence of death was properly imposed.

POINT ONE

WHETHER A TRIAL JUDGE, IN A SECOND CAPITAL SENTENCING HEARING, IS REQUIRED TO HEAR LIVE TESTIMONY IN AGGRAVATION WHEN THE SOLE PURPOSE OF THE HEARING IS TO AFFORD THE OPPORTUNITY TO PRESENT MITIGATING EVIDENCE WHICH WAS NOT PRESENTED IN THE FIRST HEARING?

This point is a good example of the process by which an issue formed and decided at the trial level somehow becomes a different one when considered on appeal.

Douglas filed a pleading styled "Motion to Preclude Reading of Transcript". (R 30) This document was painfully brief and in pertinent part, only asked the trial court to rule that the former testimony included in the transcript of trial would not be received in evidence unless it could be shown that the witness or witnesses providing such testimony were unavailable. No reasons were provided in support of this motion demonstrating why such a ruling was necessary, and, but for a reference to a statutory exception to hearsay exclusions, no legal authority was offered.

On hearing of the motion, Douglas, argued, again only briefly, that the "recording of previous testimony of witnesses" should not be allowed into evidence unless the witnesses were not available to testify in person. (R 46) After response by the state, Douglas elaborated by contending that the court was required to make a new factual determination of aggravating circumstances and, added the incorrect assertion that the basis of the federal court's judgment included a notion of ineffectiveness going to counsel's cross-examination of witnesses

during the trial phase. (R 50)

On appeal, we learn for the first time that the reasons the trial judge should have granted the motion are as follows: (1) by relying on the cold transcript of the trial, the sentencing judge did not adequately prepare himself to impose sentence; (2) by denying the motion, the sentencing judge acted as a reviewing court rather than a sentencing court; (3) the new sentencing judge improperly relied upon demeanor evaluation conducted by the former sentencer and, (4) the new sentencing judge apparently should have arranged for the original sentencing judge to have presided. (Appellant's brief, pp. 19-20)

Judge Norris was never told that his review of the trial transcript would not (or did not) adequately prepare himself for imposing sentence. He was never told that relying on the transcript would cause him to act as a reviewing rather than a sentencing court and, he was likewise never told that by reading the transcript, he would have been relying on former demeanor evaluation. More importantly, Judge Norris was never asked to arrange for Judge Love to preside for any reason, much less the one advanced here. We suggest that an appellate allegation of error should be at least predicated on a fair opportunity for a trial court to commit that error based on identical theories.

Even if the appellate issue were the same framed at trial, Douglas has presented no authority to support his bold assertion that the reading of the trial transcript deprived him of due process of law and that the sentence was imposed in violation of Eighth Amendment cruel and unusual standards. He provides

nothing compelling which indicates that the trial court committed any error whatsoever. The claim that Judge Norris did not adequately prepare himself to impose sentence is misleading; what appellant dislikes is the fact that the trial judge did not prepare himself in the way requested. The same applies to the notion that Judge Norris acted as a reviewing rather than a sentencing court. That is not true. The only things Judge Norris reviewed were facts of guilt established at the former trial which happened to have also served as factors in aggravation for purposes of sentence. These facts were found by the jury as reflected in their verdict and were judicially approved on review by this court. Douglas's attempt to retry these established matters of fact is understandable; however, similar attempts under similar circumstances have been held to be unjustified.

For example, in Barclay v. State, 411 So.2d 1310 (Fla 1982), on remand pursuant to a Gardner order,[1] the defendant, as here, attempted to challenge findings previously reviewed and affirmed by the court. Such an effort was adjudged unacceptable as representing an abrogation of the law of the case. See also, Dougan v. State, 398 So.2d 439 (Fla. 1981) (improper attempt to expand the proceedings on remand with irrelevant matters); Mikenas v. State, 407 So. 2d 892 (Fla. 1982) (request to impanel jury despite clear directive to the contrary). Cf. Spaziano v.

---

[1] Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 319 (1977).

State, 433 So.2d 508 (Fla. 1983), aff'd, Spaziano v. Florida. ___ U.S. ___, 104 S.Ct. 3154 (1984).

While the above cited cases dealt solely with the scope of subsequent proceedings by direction from this court, the common principle should apply with equal force to this case despite the resentencing being held at the behest of the federal court.[2] The trial court properly denied the motion to preclude his reading of the trial transcript. To have done otherwise would have abrograted the law of the case. Barclay, supra.

---

[2]The scope of state proceedings after federal treatment of the cause is an issue present in the case of Charles William Proffitt v. State, case no. 65,507.

POINT TWO

WHETHER THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED AND PREMEDITATED PROPERLY APPLIES TO SENTENCING FOR AN OFFENSE WHICH TOOK PLACE PRIOR TO THE EFFECTIVE DATE OF THAT CIRCUMSTANCE.

Although Douglas acknowledges the consistent and adverse case law on this issue, he nevertheless frames and predicates his claim on a different basis and one which we consider tenuous at best, i.e., the fact that he has been resentenced for a crime occurring prior to the enactment of the cold, calculated and premeditated aggravating circumstance.

In his first contention, he claims that he should have been allowed to waive this aggravating factor, relying on the decision in Maggard v. State, 399 So.2d 973 (Fla. 1981). However, Douglas, as did the defendant in Johnson v. State, 438 So.2d 774 (Fla 1983), misses the point as to the holding in Combs v. State, 403 So.2d 418 (Fla. 1981), in this regard. As was explained in Johnson, supra, the "inure to the benefit" language in Combs was contained in a statement in response to the claim that all premeditated murders will automatically start with one aggravating factor. 438 So.2d at 779. Moreover, this factor, unlike the situation in Maggard, supra, is not one in mitigation; it is a factor legislatively determined to aggravate a capital murder and if it is subject to being "waived" at all, then it can only be waived by the party seeking to prove it, i.e., the state.

Douglas claims that Johnson, supra, is not applicable because there, the commission of the crime was after the

enactment of this additional aggravating factor. While that may be true, the fact that the defendant in Combs, supra, like Douglas, committed his crime before the amendment renders such a position untenable.

Douglas also claims a violation of ex post facto doctrines but conspiciously omits relevant and controlling case law against his position. This court has consistently held that the cold and calculated factor could be retroactively applied since the creation of the additional factor did not change the substance of the sentencing law to the detriment of capital offenders. Combs v. State, supra; Justus v. State, 438 So.2d 358 (Fla. 1983); Smith v. State, 424 So.2d 726 (Fla. 1982); and Justus v. Florida, ____ U.S. ____, 104 S.Ct. 1332. Interestingly, when the defendant in Justus petitioned the Supreme Court of the United States for a writ of certiorari claiming a violation of the ex post facto clause of the United States Constitution, his contention was rejected by virtue of the petition being denied. Although we concede that the denial of the petition for writ of certiorari, generally, imports no expression of opinion upon the merits of a given case, it is seen that the denial was over the objection of the two dissenters such that the issue obviously was under consideration.

Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d. 17 (1981), does not control. Controlling law on this particular issue is more appropriately found in Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). There, it was explained that a law is not in violation of the ex post facto

clause unless it punishes an act as a crime which was innocent when committed, makes more burdensome the punishment for an act after it was committed, or deprives one charged with a crime of a defense available according to the law at the time it was committed. In Dobbert, the Court considered whether changes in the Florida death penalty statute subjected Dobbert to trial under an ex post facto law. Dobbert committed his murder at a time when the old sentencing law had been in effect. He was tried under the new and current capital sentencing scheme. In rejecting the contention that his trial under the new procedures violated his constitutional rights, the Supreme Court pointed out that the ex post facto clause does not give a criminal defendant a right to be tried, in all respects, by the law in force at the time the crime was committed. The ex post facto clause was not intended to control procedural changes. Such a change -- one which does not change the quantum of punishment for an offense, but rather alters only the methods employed in determining whether that sentence is to be imposed -- is not in violation of the ex post facto clause.

The Court in Dobbert was reviewing the entire capital statute. The Court noted that the new statute was not only procedural, but also ameliorative, and the Court did not say that the procedural change must also be ameliorative or inure to the benefit of the defendant. Indeed, the Court specifically stated that even though a procedural change may work to the disadvantage of a defendant, it nevertheless is not a violation of constitutional concepts of ex post facto. Cited in support of

this statement were Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed.2d 262 (1884) and Thompson v. Missouri, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898). Additonally , in footnote 6 to Dobbert, the Court pointed out that the ameliorative aspect was an independent basis for its decision.

Douglas also claims that had the trial court not found this factor in aggravation, it would have been "unlikely that the resentencing judge would have found that the aggravating factors outweighed the mitigating,. . ." (Appellant's brief, p. 24) This overlooks the findings of fact entered by the trial judge wherein he stated that each aggravating circumstance was weighed both individually and then collectively against both non-statutory mitigating circumstances and it was found that in each, aggravating circumstance or circumstances outweighed the mititgating circumstances. (R 181) In light of this, it is not only likely but also certain that the same sentence would have been imposed.

Douglas also presents an "independent" basis of his claim, i.e., the state constitutional provisions found in Article X Section 9, of the Florida Constitution. He fails to mention, however, that the identical challenge was rejected in Justus v. State, supra.

POINT THREE

WHETHER THE TRIAL COURT PROPERLY FOUND THE FACTORS IN AGGRAVATION.

Douglas complains that the trial court erred in finding that the capital murder was committed in an especially heinous, atrocious, and cruel manner and that it was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

With regards to the heinous, atrocious, and cruel factor, we note that nothing changed in evidentiary terms relative to this finding. This factor was found to have existed in the first trial and a sentence of death based on that factor was approved and affirmed by this court. Douglas v. State, 328 So.2d 18 (Fla. 1976). There, in reviewing the sentence of death the court pointedly stated:

> The abuse to which the victim was subjected to prior to his death and the manner in which he was killed was especially heinous, atrocious and cruel. The method by which the victim and his wife were taken to the location by a complicated route where the killing occurred reflects a determination to kill. Even getting the vehicle stuck and having to get help to have it freed did not break that determination. The evidence is clear that the murder was committed in a cold and calculated manner. (emphasis added) 328 So.2d at 21

It is submitted that the above quoted language is law of this case and that law is just as proper today as it was ten years ago.

Even the Supreme Court, in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), in its discussion of

this factor, considered the facts in this very case as representing a "depraved murder". 96 S.Ct. at 2969, note 12. The Court further considered the circumstances of this particular case as accurately being characterized as pitiless and unnecessarily torturous.

Even if the above were not so, and were this case and this factor being reviewed for the first time today, Douglas' contention must still fall. Although he acknowledged the existence of proof of this factor at trial, (R 155) he still argues here that it was improperly found by the trial court. An analysis of his argument leads to the conclusion that the basis of his contention is that the victim, Jay Atkins, either did not suffer at all or did not suffer enough immediately prior to his death. We have no quarrel with the case authorities upon which Douglas relies; our complaint is that the argument is presented without any regard to the evidence at trial.

From the very inception of the encounter which was destined to end in the murder of the victim, death was on the victim's mind. While we know the particular words Douglas used when ordering Mr. Atkins to pull the car off the road, (TT 235) we do not know the manner in which they were delivered. However that was, it was sufficient to cause Mr. Atkins to obey the command. Mr. Atkins had a feeling that something bad was about to happen, and he asked his wife to promise him that she would stay alive. (TT 237) Indeed, after brandishing his weapon, getting in the Atkins' vehicle, and giving directions, the first thing Douglas told the couple was that he felt like blowing both of their

"mother fucking brains out." (TT 238) Even Mrs. Atkins had a feeling that Douglas was going to kill her. (TT 240) When securing help to get the vehicle unstuck, Douglas told the Atkinses not to say anything or that he would shoot them with a pistol that he had in his pocket. (TT 241) Later while Mr. Atkins was being forced to have intercourse with his wife, Douglas actually fired the rifle into the air. (TT 254) He did this apparently after having had the weapon pointed at Mrs. Atkins' head. (TT 257)

To even suggest that it ". . . would certainly not be unreasonable to conclude that the victim did not believe that he would not be killed prior to the homicide itself." (Appellant's brief, p. 29), is to ignore not only the evidence but also the realities of human events.

Several "instantaneous" death cases were presented to and considered by the court in the case of Routly v. State, 440 So.2d 1257 (Fla. 1983).[3] As the court noted, the common element in each of those cases was that before the instantaneous death occurred, the victims were subjected to agony over the prospect of death. Here, there can be no doubt that Mr. Atkins was subjected to agony over the prospect of death. Indeed, that prospect was practically the first thing on the man's mind. Contrary to Douglas' assertion, King v. State, 436 So.2d 50 (Fla.

---

[3]Smith v. State, 424 So.2d 726, (Fla. 1982); Griffin v. State, 414 So.2d 1025 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982); White v. State, 403 So.2d 331 (Fla. 1981); Knight v. State, 338 So.2d 201 (Fla 1976).

1983) cannot be meaningfully distinguished from the facts in this case. If there is any degree of distinguishment, it is that the facts here are far worse.

With regards to the cold, calculated factor, the above-quoted language also supports that finding, especially considering Douglas' "determination to kill". Try as he might, Douglas cannot alter the fact that he possessed the heightened premeditation necessary to satisfy a finding of this factor. In this vein we agree with Douglas that the prior relationship of all the parties distinguishes this case. Unfortunately, the distinguishment is that which adds support to the trial court's findings. If the prior romantic involvement between Douglas and Mrs Atkins were the motivating factor for his deeds, then why wasn't Douglas satisfied after humilitating both of the Atkinses through forced sexual activity?

If Douglas was intending to get even or somehow show his displeasure with either or both of them, he could have very easily left them out in the woods naked. To have deliberately planned and done all that he did to the Atkinses and <u>then</u> to have killed Mr. Atkins was an act utterly without any pretense of moral or legal justification. His "determination to kill" was clearly established by the evidence. In fact, it appears that the intention to kill was perhaps paramount and that the sexual preliminaries were designed to inflict extreme disgrace and humiliation before death. The evidence indicates no less.

It must be remembered, that Douglas' first announcement to the doomed couple was that he felt like blowing their brains

out. (TT 238) This intention was fulfilled, at least as to Mr. Atkins, and was accomplished despite the chance to break the matter off. It is noteworthy that when the Atkins' car became stuck and the attempt to free it failed, Douglas walked over to a nearby mine and made arrangements for help. (TT 241) Eventually, the car was pulled out and the trio followed Marshall back to the hard road. (TT 245) It occurs to us that if ever there was an opportunity for Douglas to rethink his intention, it was at that point in time. After all, the plans had been interrupted and two potential witnesses had entered the picture. In spite of this, Douglas displayed dogged resolution to effectuate his "determination to kill". This is precisely the degree of "extra" premeditation contemplated by the legislature as interpreted by this court. This factor was properly found.

POINT FOUR

WHETHER THE RECOMMENDATION OF THE JURY WAS PROPERLY OVERRIDDEN IN THIS CASE.

After finding the two factors in aggravation, the trial court considered the evidence presented by Douglas in mitigation of sentence. As a consequence, he found that Douglas was not known, prior to the murder, to be a violent person and that while in prison for the last twelve years, Douglas had had an excellent institutional record (R 180). The trial court tempered the first finding noting that the testimony of non-violence was weakened by the violent nature of the very acts for which Douglas stood convicted. He tempered the second finding by noting that Douglas' "satisfactory" evaluation was received while in an atmosphere possibly providing little or no opportunity for misconduct. In both instances, the trial court gave Douglas the "benefit of every doubt" and found the non-statutory mitigating factors to exist. (R 180)

The court then applied the standard announced in Tedder v. State, 322 So.2d 908 (FLa. 1975), and gave "great and careful consideraton to the advisory recommendation of life given by the jury." (R 181) However, the court could find no reasonable basis discernable from the record to support that recommendation. Douglas disagrees with this conclusion and claims that the existence of mitigating evidence that was found should have caused greater weight to be given to the recommendation such that it should not have been ignored.

Both the recommendation of life and the sentence have

remained constant. The only difference in the weighing process is the existence of two non-statutory mitigating factors. We suggest therefore that the reliability of overriding the recommendation this time should be measured in terms of the weight assignable to those mitigating factors.

Both Songer v. State, 365 So.2d 696 (Fla. 1978), and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L. Ed 2d 973 (1978), clearly established the right for capital defendants to present all evidence bearing on character and record of the accused. Both decisions, however, very properly restricted presentation of that evidence to that which is relevant. While the evidence concerning Douglas' past "non-violent" behavior is somewhat relevant in terms of character and record, we do not feel that Douglas' institutional record is of significant relevance, if any at all. What Douglas may have done or not have done while on death row demonstrates only conduct going to character and record occuring after his crime. The relevance of this factor is perforce slight to non-existent.

The testimony of non-violence was provided by relatives and loved ones. Considering the past sentence, a similar sentence was more than just a possiblity, and thus, their testimony must be judged in light of that fact. Assuming a jury had heard this testimony and again imposed a recommendation of life, there still would be no reasonable basis for that recommendation. Contrary to Douglas' assertion, to have believed Mrs. Atkins at all was to necessarily have found the factors in aggravation. Either factor in aggravation, standing alone, was sufficient to outweigh

anything presented in mitigation. Under the facts and circumstances of this case, the recommendation was not only unreasonable but it approached the incomprehensible. In other words, as intimated in Douglas v. State, 373 So.2d 895 (Fla. 1979), the recommendation would have been based on irrational and/or capricious reasons. The Tedder standard was properly observed and utilized. The override was proper and the sentence lawfully imposed.

CONCLUSION

Based on the foregoing arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

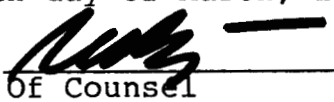
Jim Smith
Attorney General

Richard W. Prospect
Assistant Attorney General
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. mail to Douglas A. Connor, Assistant Public Defender, Attorney for Appellant, Hall of Justice Building, 455 North Broadway Avenue, P.O. Box 1640, Bartow, Florida, 33830, this 17th day of March, 1986.



Of Counsel