

IN THE FLORIDA SUPREME COURT

HOWARD VIRGIL LEE DOUGLAS, :
Appellant, :
vs. :
STATE OF FLORIDA, :
Appellee. :
_____ :

Case No. 167,603

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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5,7,10

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1,2,6,7,9,10

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5

3

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4,5

STATEMENT OF THE CASE

Appellant will rely upon the Statement of the Case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his initial brief.

SUMMARY OF ARGUMENT

Due process requirements apply during the capital sentencing process before the judge. Included within these due process rights is the right to cross-examine witnesses presented by the other side. Since the resentencing court relied on a reading of the transcript rather than the production of live testimony, Appellant's right of confrontation was circumvented.

That the State witnesses were cross examined at trial does not cure the error. The interface between the hearsay rule and the Confrontation Clause of the Sixth Amendment demands a showing of witness unavailability before prior trial testimony can be admitted upon retrial regardless of prior cross-examination. The due process requirements of a capital sentencing proceeding are no less.

A majority of this Court held in Combs v. State, 403 So.2d 418 (Fla.1981) that the aggravating circumstance of Section 921.141(5)(i), Florida Statutes (cold, calculated and

premeditated) can be retroactively applied to defendants whose offense predated the 1979 enactment without violating ex post facto provisions of the Florida and federal constitutions. However, this holding has never been applied to any defendant who was not both tried and sentenced after the effective date of the new aggravating factor.

Retroactive application to Appellant, who was tried in 1973, upon resentencing, is an entirely different matter. Because Douglas had no notice when he was tried that he would later have to defend against the cold, calculated and premeditated aggravating circumstance, he was denied due process of law. He was also denied equal protection of the laws because no capital defendant in the class tried prior to the July 1, 1979 effective date of Section 921.141(5)(i) has had a death sentence affirmed by this Court which relied upon this aggravating factor.

Finally, Appellant's constitutional right to assistance of counsel was frustrated because counsel at trial had no motivation to dispute evidence which might tend to establish this later-enacted aggravating circumstance. Because the resentencing judge relied upon the transcript of the trial in assessing whether this aggravating factor was proved, there was never any effective cross examination of witnesses in regard to this aggravating circumstance. Had defense counsel's request for production of the witnesses for testimony and cross examination been heeded, this error might have been cured. As it stands, several constitutional rights not implicated in Combs

were violated when Douglas was resentenced to death utilizing the cold, calculated and premeditated aggravating factor.

ARGUMENT

ISSUE I.

THE RESENTENCING JUDGE ERRED BY DENYING APPELLANT'S MOTION TO PRECLUDE READING OF TRANSCRIPT AND FAILING TO REQUIRE THE PRESENTATION OF LIVE TESTIMONY BECAUSE HE WAS NOT THE ORIGINAL TRIAL JUDGE AND HAD NO OPPORTUNITY TO EVALUATE THE DEMEANOR AND CREDIBILITY OF THE WITNESSES.

In Engle v. State, 438 So.2d 803 (Fla.1983), this Court noted that due process requirements apply during all three phases of a capital proceeding in the trial court. Due process must be observed not only in the guilt or innocence phase of the trial and the penalty phase before the jury, but also in the final sentencing process by the judge. See also Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978). Accordingly, Fla.R.Crim.P. 3.780(a) allows both the State and the defendant to present evidence relevant to aggravation or mitigation in the sentencing hearing but requires that "[e]ach side...be permitted to cross examine the witnesses presented by the other side."

In the sentencing at bar, the State's evidence in aggravation consisted of the prior testimony of the sole eyewitness to the murder, Helen Atkins, within the framework of the corroboration and impeachment by other witnesses who testified at trial. By relying solely on the reading of the transcript,

the sentencing court denied Appellant the right to cross examine the witnesses against him at this sentencing hearing.

It is well-settled that the Confrontation Clause of the Sixth Amendment, United States Constitution allows admission of prior trial testimony upon retrial if the declarant becomes unavailable. Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895). This axiom is reflected in the Florida Evidence Code, Section 90.804(2)(a), Florida Statutes (1983). But as trial counsel pointed out to the sentencing judge, unavailability is a strict condition to allowing the introduction of former testimony which is hearsay in the present proceeding. (R30,46)

In Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the United States Supreme Court discussed the relationship between the Confrontation Clause of the Sixth Amendment and the hearsay rule. The Court concluded that the Sixth Amendment establishes a rule of necessity. If a declarant's prior testimony in court is to be used against a defendant at trial, the prosecution must either produce the declarant or demonstrate unavailability.

While Appellee's point that the federal courts did not find counsel's cross-examination of witnesses at trial to be ineffective (Brief of Appellee p.6-7) is correct, it merely begs the question of whether a prior cross examination of the witness satisfies constitutional and evidentiary standards of admissibility for prior in-court testimony. Clearly, the answer is that unless the witness is actually unavailable, neither the Confrontation Clause of the Sixth Amendment nor the hearsay ex-

ception of the Florida Evidence Code, Section 90.804(2)(a) is satisfied. See Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). C.f. Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972).

In holding that it was error to consider the confession of a co-defendant where the co-defendant was not available for cross examination in a capital sentencing proceedings, this Court in Engle v. State, supra held that the right of confrontation protected by cross-examination is applicable to the capital sentencing process. Implicit in the Engle decision is the recognition that the final sentencing process before the judge in a capital case differs from the non-capital case because additional findings must be made before a death sentence may be imposed. Therefore, the due process requirements of a capital sentencing are those afforded by Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).

Because Fla.R.Crim.P. 3.700(c) does not specify how a successor sentencing judge should acquaint himself with the facts of the case, it must be presumed that the Rule contemplates that the judge will have to use different methods, depending upon the constitutional requirements of the case. Where a capital sentencing procedure is involved, the Sixth, Eighth and Fourteenth Amendments to the United States Constitution require live testimony with opportunity for cross-examination unless the State can show witness unavailability.

ISSUE II.

THE RESENTENCING JUDGE ERRED BY
CONSIDERING THE AGGRAVATING CIR-
CUMSTANCE OF SECTION 921.141(5)
(i), FLORIDA STATUTES (COLD, CAL-
CULATED AND PREMEDITATED) BE-
CAUSE THIS AGGRAVATING CIRCUM-
STANCE WAS NOT IN EXISTENCE AT
THE TIME OF APPELLANT'S TRIAL AND
ORIGINAL SENTENCE.

Appellee argues that Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) which holds that procedural changes, even if disadvantageous to a defendant, are not violative of ex post facto provisions controls retroactive application of Section 921.141(5)(i), Florida Statutes in Douglas's sentencing. This contention has not been accepted by this Court in Combs v. State, 403 So.2d 418 (Fla.1981) or elsewhere. Indeed, this Court specifically stated that "the provisions of Section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty." Vaught v. State, 410 So.2d 147 at 149 (Fla.1982). The only possible application of Dobbert, supra to support the decisions in Combs, supra and its progeny is the "ameliorative" aspect of the retroactive changes cited in a footnote as an independent basis for the Dobbert court's decision.

Setting aside the question which divided the Combs court, whether the addition of Section 921.141(5)(i) could ever "inure to the benefit of a defendant," it is clear that Douglas was not benefitted by the change. Although Appellee asserts that the distinction between having this aggravating factor applied retroactively at resentencing as in the case at bar and

applying the aggravating factor retroactively at the initial trial and sentencing is "tenuous at best" (Brief of Appellee, p.10), in fact the fundamental fairness of the resentencing procedure is implicated.

Defendants like Combs were both tried and sentenced with reference to the added aggravating factor provided in §921.141(5)(i). Thus, although the factor was not in existence when their offenses were committed, they at least had notice at their trials that the State would attempt to utilize the cold, calculated and premeditated aggravating factor to impose a sentence of death. By contrast, when Douglas was tried in 1973, he had no idea that he would ever have to defend against any measure of premeditation being used as an aggravating factor.^{1/} This basic distinction between Douglas and the others implicates constitutional guarantees of due process of law and equal protection under the Fourteenth Amendment, United States Constitution and the Sixth Amendment right to assistance of counsel.

It is elementary that due process of law requires notice to a criminal defendant of the charges he must defend against. Due process is violated as much by conviction on a charge for which a defendant was never tried as by conviction on a charge never made. Cole v. Arkansas, 333 U.S. 196, 68 S.Ct.

^{1/} Prior to the 1979 enactment of paragraph (i), this Court had rejected use of premeditation as an aggravating circumstance. See Riley v. State, 366 So.2d 19 at 21, fn.2 (Fla.1978)(lengthy premeditation); Brown v. State, 381 So.2d 690 at 695-696 (Fla. 1980)(premeditated design); Blair v. State, 406 So.2d 1103 at 1108 (Fla.1981)(premeditated design).

514, 92 L.Ed. 644 (1948). Due process principles of fundamental fairness apply to the penalty phase of a capital trial. Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978).

Without notice that the State would eventually use the testimony at trial to prove a then non-existent cold, calculated and premeditated aggravating circumstance to support imposition of the death penalty, Douglas had no reason to develop a trial strategy which would defend against this factor. Constitutional due process requires that absent notice of this factor and opportunity to defend,^{2/} the later enacted cold, calculated and premeditated circumstance cannot be now applied at resentencing.

In Lee v. State, 340 So.2d 474 (Fla.1976), this Court vacated on equal protection grounds a death sentence imposed upon a defendant who belonged to the class of defendants who had been sentenced to death prior to the United States Supreme Court decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Reasoning that the question of life or death should not depend upon when a defendant requested reduction of his sentence, the Lee court acknowledged the responsibility "to ensure that similar results are reached in similar cases." 340 So.2d at 475.

^{2/} Opportunity to argue the inapplicability of this aggravating factor at resentencing cannot substitute for opportunity to defend against this aggravating factor at trial.

In the case at bar, Douglas belongs to the class of capital defendants who were tried prior to the July 1, 1979 effective date of Section 921.141(5)(i). Among this class, no other defendant^{3/} has had a death sentence affirmed by this Court which relied upon the later enacted aggravating circumstance. Certainly, by analogy to Lee, supra the mere happenstance that Douglas's death sentence was not held invalid until after enactment of Section 921.141(5)(i) should not control whether this factor is applied.

Finally, retroactive application of this aggravating circumstance to Douglas violates the Sixth Amendment right to effective assistance of counsel. His attorney at trial failed to assist Douglas in defending against evidence which might tend to establish the cold, calculated and premeditated aggravating circumstance. Certainly cross examination of witnesses might have taken a different tack had trial counsel been aware that a death sentence might later hinge upon whether any evidence of heightened premeditation was effectively countered. C.f. Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L. Ed.2d 426 (1978) (deprivation of assistance of counsel in capital proceeding requires automatic reversal).

This error might have been cured had the State, in the resentencing, agreed to defense counsel's request to present live testimony of the State witnesses absent a showing of unavailability. (R30,46,49-50) Opportunity to cross examine the

^{3/} The case of Proffitt v. State, Case No. 65,507 is currently pending before this Court and raises similar points to the ones presented here.

witnesses called at the trial phase as to matters relevant to penalty phase was specifically requested. (R50) Since the State successfully persuaded the sentencing court to dispense with live testimony and cross examination, the State should be precluded from contending that Section 921.141(5)(i) is an aggravating factor applicable to Douglas.

Because the position of Douglas materially differs from the positions of Combs and similar defendant's who were both tried and sentenced while Section 921.141(5)(i) was part of the capital sentencing scheme, this Court need not overrule Combs v. State, 403 So.2d 418 (Fla.1981) in order to hold that retroactive application of the aggravating factor to Douglas violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as ex post facto principles.

ISSUES III. & IV.

Appellant will rely upon the arguments as presented in his initial brief.

CONCLUSION

Appellant will rely upon the Conclusion as presented in his initial brief.

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, 125 North Ridgewood, 4th Floor, Beck's Building, Daytona Beach, Florida 32014, by mail on this 11th day of April, 1986.

Douglas S. Connor
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