19 pages

IN THE SUPREME COURT OF FLORIDA

SCOTT PATTERSON, Appellant,	)
vs.	) CASE NO. 67,830
STATE OF FLORIDA, Appellee.	)

Tanya

REPLY BRIEF OF APPELLANT

HARRY GULKIN, P.A.
1700 East Las Olas Blvd.
Suite 300
Fort Lauderdale, FL 33301
Phone: 305-462-4600

Counsel for Appellant

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STATEMENT OF THE FACTS

Appellee contends that "Appellant's statement is self-serving, incomplete and argumentative . . . " [Appellee's Brief at 3].

No mention is made in Appellee's Statement of the Facts of the sobriety of Appellant within thirty (30) minutes of the Appellant entering the decedent's residence.

During discussion of Point III, Appellee again chose not to mention those portions of the testimony of Nurse Baier or others which clearly evidenced the uncontroverted facts that Appellant had consumed a large quantity of alcohol prior to the stabbing incident.

The relevant and succinct testimony of Francine Costa, in pertinent part, revealed the following, regarding the state of sobriety of Appellant shortly before the death of the decedent:

> "Then when he went to the bar and he came over our house that--between one and 1:15 he was drunk . . . when I opened the door he smelled like a brewery . . . he was flushed. And he was being very silly . . . . he was slurring. He was talking slurred like a drunk person talks. (TR.1463; 1466-;467) [emphasis added]

Appellee, on page 27 of its brief, sets forth a portion of Nurse Baier's testimony as it related to her clinical observations of Appellant; however, Appellee conveniently omits the following observations by Nurse Baier:

> "He was very pale." [TR.1486]
>
> \- - -
>
> "He was sweating." [TR.1487]
>
> \- - -
>
> "He seemed mechanic. His speech was mechanical. Clipped . . . Robot-like. Very little inflection . . . he seemed to be physiologically like he was somewhat shocky. . ." [TR.1488]
>
> \- - -
>
> "I smelled alcohol on his breath." [TR.1499]

The reference by Appellee in its brief on page 28 to Appellant being able to drive away in his car is taken out of context.

The testimony of Francine Costa at TR.1471 referred to Appellant driving his car at 9:45 PM, <u>not</u> at one o'clock in the morning <u>after</u> Appellant had consumed two pitchers of beer.

Appellee suggests that "none of the witnesses presented by the defense testified that Appellant was intoxicated to the extent that his faculties or mental processes were impaired." [Appellee Brief at 28]

Once again, Appellee omits to acknowledge the testimony of Frank Terracciano, as follows:

> "I saw him at approximately quarter after one and stayed over my house until approximately twenty -- until quarter to two . . . He was a little drunk . . . well, he was pretty much drunk. . ."[TR.1446]

- - -

> "I've never seen him in that kind of condition except one time . . . when he was out of the service and he was drunk . . . " [TR.1448]

- - -

> "And he was very -- slower. More slugish." [TR.1448]

- - -

> "He was drunk. He was definitely legally drunk in my opinion when I saw him." [TR.1448-1449]

- - -

> "But he was slow. His reactions weren't quick . . . He was, my opinion one hundred percent - - He was drunk." [TR.1449]

POINT I

THE TRIAL COURT ERRED BY DENYING APPELLANT'S PRETRIAL MOTION TO SUPPRESS VERBAL STATEMENTS.

LEGAL ARGUMENT

The improper influence exerted upon Appellant by Detective Pierson came in two distinct forms: subtle remarks and blatant misstatements.

Because Appellant was aware that his mother, a supervising nurse in the same hospital wherein Appellant was a patient, knew and was friendly with Detective Pierson, he was more vulnerable to suggestions by the Detective to "get it off his chest" [TR.275], that it would "be better for Appellant's mother". [TR.275]

Appellant described his state of mind as being "a pressure kind of thing". [TR.274]

It is clear that Detective Pierson was using psychological methods to get Appellant to make an incriminatory statement. He, in reality, was using his friendship with Mrs. Patterson as a catalyst to get Appellant to "make it easier" on himself. [TR.274]

Those subtle prodding methods coupled with an unrealistic suggestion that Appellant "could probably maybe go with self-defense or something" [TR.274] resulted in improper and undue influence over Appellant, the result of which should cause the Court to

rule that the Trial Court erred in denying the Motion to Suppress. Williams v. State, 441 So.2d 653 (Fla. 3rd DCA 1983), review denied, 450 So.2d 489 (Fla. 1984); Foreman v. State, 400 So.2d 1047 (Fla. 1st DCA 1981); Thomas v. State, 456 So.2d 454 (Fla. 1984) and cases cited in Point I of Brief of Appellant.

POINT II

THE TRIAL COURT ERRED BY ALLOWING GRUESOME PHOTOGRAPHS AND IRRELEVANT EVIDENCE TO COME BEFORE THE JURY.

LEGAL ARGUMENT

Appellee seeks to justify the admission of Exhibits 59 through 66 on the theory that they "were used to show the areas of the victim's body from which Detective Edel collected blood samples". (Appellee Brief at 20)

That proposition is faulty because there were many other non-gruesome photographs of the decedent from which that information could have been discerned and presented to the jury.

"Position of the victim's body in relation to the crime scene" [Appellee Brief at 21] is another erroneous theory upon which to justify admission into evidence of these shockingly gruesome photographs.

Had Appellee seen the photographs that are being discussed, it would have observed certain close-up angles that lend no relevance to body position in the crime scene. Nor was the cause of death ever a disputed issue.

Again, while conceding that the basic test for admissibility of photographs is relevancy, Straight v. State, 397 So.2d 903 (Fla. 1981), under the circumstances of this case vis a vis the Trial Court recognizing the gruesome nature

of Exhibits 59 through 66 and the fact that the photographs were admitted during a witness' testimony other than the medical examiner, it is submitted that the subject photographs were not relevant to the issues before the jury and the Trial Court committed reversible error by admitting same. Young v. State, 234 So.2d 341 (Fla. 1970).

POINT III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO REDUCE COUNT I OF THE INDICTMENT FROM MURDER IN THE FIRST DEGREE TO MURDER IN THE SECOND DEGREE AT THE CLOSE OF ALL THE EVIDENCE IN THE CASE.

LEGAL ARGUMENT

The most glaring issue in dispute between the parties is the nature of the underlying felony relating to the theory of felony-murder.

Appellant stated at page 29 of its Initial Brief:

> "Since the underlying felony upon which the felony murder charge has been based is a specific intent offense (to-wit: Burglary), the defense of voluntary intoxication applies to the felony murder theory." (emphasis added)

Appellee stated at page 29 of its Answer Brief:

> "Because the underlying felony for the felony murder was sexual battery, a general intent crime, the defense of voluntary intoxication was not applicable for first degree murder under the felony murder theory." (emphasis added)

Appellee's general statement of case law in this State is not challenged; the legal principles are simply not applicable to the matter *sub judice*.

Appellant clearly established his state of intoxication prior to his entering the decedent's home through testimonial as well as physical evidence.

Appellee fails to recognize this Court's decision in Gurganus v. State, 451 So.2d 817 (Fla. 1984) as being a most recent decision pertaining to the defense of voluntary intoxication as it affects the mental ability of an accused to entertain a specific intent to commit murder. 451 So.2d at 822.

The facts are all self evident; the description of the Appellant by two friends approximately thirty (30) minutes before the homicide is very crucial to the issue of intoxication and ability to form specific intent.

The uncontroverted opinion by the medical examiner that Appellant probably had a .145 blood alcohol level at the time of the offense bolsters the defense that Appellant was unable to form the requisite specific intent to kill the decedent; there can be little doubt that Appellant did not "reflect" on his physical actions of stabbing the decedent sufficiently to comprehend what he was doing. Gentry v. State, 437 So.2d 1097 (Fla. 1983).

The underlying felony was not sexual battery; accordingly, those cases cited by Appellee as to general intent crime are inapplicable.

There was more than sufficient basis in fact and in law to justify the Trial Court granting the Appellant's

Motion to Reduce Count I to a lesser degree of murder. The Court's denial of that motion constituted reversible error.

POINT IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT REQUESTED THE STATE ATTORNEY THE RESPONSIBILITY FOR PREPARING THE FINDINGS UPON WHICH THE SENTENCE OF DEATH WAS BASED.

LEGAL ARGUMENT

Appellant relies upon its argument contained in the Initial Brief.

The Trial Court's words, as reproduced by Appellant in its Initial Brief, are not vague or indistinct.

On two separate occasions, the Trial Court made its position known, i.e., that the State would prepare a Sentencing Order. [Tr.1823; TR.1828]

Because Appellee concludes what occurred was tantamount to a "clerical request", the case law prohibits what was done in this case - an improper delegation of a function committed exclusively to the judiciary. See, Carnegie v. State, 473 So.2d 782 (Fla. 2d DCA 1985); Johnson v. State, _____ So.2d _____ (Fla. 2d DCA 1986) [11 FLW 315].

POINT V

THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE ON THE APPELLANT.

LEGAL ARGUMENT

Contrary to the interpretaion of the Trial Court's words as they made reference to the lack of remorse by Appellant, the fact remains, as evidenced by the language found at pages 1820-1821 of the transcript, that the Trial Court considered lack of remorse in ultimately reaching the conclusions to sentence Appellant to death. Appellant relies upon the langauage set forth in Stano v. State, 460 So.2d 890 (Fla. 1984) as being dispositive of this issue.

On the issue of age, additional cases in which age has been considered to be a mitigating circumstance, see Thomas v. State, 456 So.2d 454 (Fla. 1984); Oats v. State, 446 So.2d 90 (Fla. 1984) and Smith v. State, _____ So.2d _____ (Fla. 1986) [11 FLW 345].

The facts of the instant case are strikingly similar to those in Ross v. State, 474 So.2d 1170 (Fla. 1985). Both cases involve a violent series of acts by the accused upon the decedents; in both cases, the defendants had been drinking.

Appellee's attempt to distinguish the case at bar from Ross on the ground that Ross involved a domestic

dispute is creating a distinction without a difference.

In both Ross and Patterson, the perpetrator acted in an irrational frenzy, the same type of conduct that caused this Court to reduce a death sentence in Amazon v. State, 487 So.2d 8 (Fla. 1986).

A review of all attendant circumstances should lead to the legal conclusion that the Trial Court erred by imposing the death penalty upon Appellant.

CONCLUSION

Based upon the reasons set forth, cases decided by this Court and totality of the circumstances, it is respectfully submitted that the Trial Court committed reversible errors during the trial.

Accordingly, the Court should enter its Order directing that the case be remanded for a new trial.

Respectfully submitted,

HARRY GULKIN, P.A.

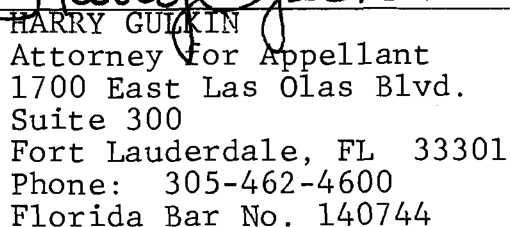
BY

HARRY GULKIN
Attorney for Appellant
1700 East Las Olas Blvd.
Suite 300
Fort Lauderdale, FL 33301
Telephone: 305-462-4600
Florida Bar No. 140744

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of the Appellant, SCOTT PATTERSON, Case No. 67,830 has been furnished, by mail, to Eddie J. Bell, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, FL 33401 this 4th day of September, 1986.

HARRY GULKIN, P.A.



BY ______________

HARRY GULKIN
Attorney for Appellant
1700 East Las Olas Blvd.
Suite 300
Fort Lauderdale, FL 33301
Phone: 305-462-4600
Florida Bar No. 140744