IN THE SUPREME COURT OF FLORIDA

GUY REGINALD COCHRAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 67,972

APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

GUY REGINALD COCHRAN will be referred to as the "Appellant" in this brief and the STATE OF FLORIDA will be referred to as the ''Appellee". The Record on Appeal will be referenced by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellee accepts the Statement of the Case and Facts as stated by Appellant with such exceptions as outlined in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

As to Issue I, the State contends that since the jury could only choose one verdict, and their choice was that of the highest offense charged, then their verdict was not limited to a specific finding of premeditation; rather, it was a finding of guilt to first-degree murder by considering evidence of both premeditated and felony murder. Moreover, there was substantial direct and circumstantial evidence from which this jury could have found premeditation.

As to Issue 11, this Court has repeatedly held that Appellant's argument is without merit.

As to Issue III, the State contends that simply because the trial court read letters from the victim's next-of-kin does not mean that he "considered" the letters in imposing death.

As to Issue IV, the State contends that the trial court properly found the murder of Carol Harris to be especially heinous, atrocious or cruel.

As to Issue V, the State contends that the lower court did not err in overriding the jury's recommendation of life in that the court had before it the additional aggravating circumstance of Appellant's conviction for another capital felony which the jury did not have. The trial court's override was proper, Tedder notwithstanding.

ARGUMENT

ISSUE I

WHETHER THE JURY'S VERDICT OF FIRST-DEGREE MURDER WAS A SPECIFIC FINDING OF PREMEDITATED MURDER, AND IF SO, WHETHER THERE WAS SUBSTANTIAL, COMPETENT EVIDENCE TO SUSTAIN THE VERDICT?

Appellant contends that since the jury found him "guilty of murder in the first degree," they necessarily found him guilty of premeditated murder. Appellant further contends that even though there is overwhelming evidence to support a conviction for felony murder, the evidence is insufficient to sustain the conviction upon premeditation; therefore, Appellant's conviction must be reduced to second-degree murder. Appellant's contentions are unavailing.

At trial, both the State and defense agreed to use a single page verdict form listing all possible verdicts (R.342). The form started at a finding of guilt to the most serious offense charged, descended through the lessor-included offenses, and ended with a finding of not guilty. The jury returned with a verdict of guilty to the crime for which Appellant was indicted, namely, "guilty of murder in the first degree" (R.885).

The State would assert that where the instant jury could only choose one possible verdict, and where their choice was that of the most serious offense charged, then such a verdict was not based solely upon a finding of preditation; rather, it was a finding of guilt on both theories of first degree murder as charged in the indictment.

In Bates v. State, 465 So.2d 490, 491 (Fla. 1985), this Court held that,

> On its verdict form for the first count the jury could pick one of eighteen possible choices, ranging from first-degree premeditated murder to not guilty. That the jury found sufficient evidence of premeditated murder does not mean that it acquitted him of felony murder - it simply made a choice, as instructed.

The State contends that Bates is controlling over the present issue. Furthermore, it is a well-established legal tenent in this State that there is only one offense entitled first-degree murder, not two separate offenses (premediated or felony) comprising separate first-degree murders. The latter two are means of proving the single crime of first-degree murder. Therefore, when this jury was presented with a list of six possible verdicts running downward from the most serious to a finding of not guilty, their choice was not a finding of just premeditated murder and an exclusion of felony murder; rather, it was a finding of guilt to first-degree murder based upon substantial evidence adduced as to both premeditation and felony murder.

Should this Court find that the jury's verdict was limited only to premediated murder, then the State contends that there was substnatial, competent evidence to support a finding of premeditation.

After the Appellant had shot and abandoned the victim among the ruins of an old dairy, he absconded with her vehicle, a new

BMW. Shortly thereafter, he drove to Darrell Shorter's residence. Shorter testified that when he asked Appellant where he had gotten the BMW, Appellant replied, "he got the car from a bar on 7th Avenue and that he took the girl somewhere and shot her and that is how he got the car" (R.181).

This admission constitutes one of those rare findings of direct evidence where a criminal defendant actually admits his premeditative intent to kill the vicitm so as to gain the fruits of his crime. When this direct evidence is taken in conjunction with the circumstantial evidence surrounding the commission of the offense, the jury could reasonably find premediation without basing its finding solely on circumstantial evidence. Thus, the standard of McArthur v. State, 351 So.2d 972 (Fla. 1977), is inapplicable to the present case in that McArthur applies to only those cases where the ~~mens rea~~ is proven by circumstantial evidence alone.

The prosecutor's theory regarding premeditation was that the Appellant had already pre-determined that he would have to eliminate the victim/witness as to successfully effectuate the robbery. For why else would the Appellant forcibly abduct the victim at gunpoint, then drive to a rural, remote area? Furthermore, even if the jury could find that the shooting was not planned, the State contends that the element of premediation could be established after the shooting, but before death. Appellant's confession (R.1077) and the physical evidence (R.165, 173) indicates that after shooting the victim, Appellant pulled

off Highway 301, removed the victim from the car and dragged her still-alive body away from the highway (obviously to avoid easy detection). This act of concealing the victim sealed her doom. This act was a conscious decision, with adequate time for reflection, to eliminate the victim/witness. Again, the jury was free to find premeditation from direct evidence of this act.

In summary, this jury had before it both direct and circumstantial evidence from which a finding of premeditation could be made; therefore, the standard for reviewing jury verdicts based solely on circumstantial evidence under McArthur v. State, supra, is inapplicable to the present case. Moreover, the presumption of correctness attending jury verdicts in circumstantial evidence cases under Heiney v. State, 447 So.2d 210, 212 (Fla. 1984), is further buttressed in this case by inclusion of direct evidence; thus, this jury's verdict of first-degree murder must not be disturbed on appeal.

ISSUE II

WHETHER IMPOSITION OF THE DEATH PENALTY IN THE INSTANT CASE WAS DISCRIMINATORILY APPLIED?

Appellant's contention as to this issue is without merit. See, Herring v. State, 12 F.L.W. 44 (Fla. Dec. 30, 1986); Smith v. State, 457 So.2d 1380 (Fla. 1984); Adams v. State, 449 So.2d 819 (Fla. 1984); Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984).

ISSUE III

WHETHER THE TRIAL COURT CONSIDERED LETTERS FROM THE VICTIM'S NEXT-OF-KIN IN SENTENCING APPELLANT TO DEATH?

Appellant contends that the trial court read and considered letters from the victim's next-of-kin in imposing the instant sentence of death in violation of §921.141(5), Fla. Stat., and in violation of Appellant's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The State disagrees and would contend that even though the lower court read both letters, there is no evidence that he considered said letters in sentencing Appellant to death.

Even though the record reflects that the trial court read the letters from the victim's mother and brother (R.682), there is no indication anywhere in the record that he considered the letters in imposing the death sentence. For the sentencing memorandum filed by the trial court shows that he found four aggravating circumstances to exist as opposed to two mitigating circumstances (R.978-979), and that the trial court's main reason for imposing the ultimate sentence was Appellant's prior conviction for another capital felony. Moreover, Appellant's statement that the trial court attached the letters to his sentencing memorandum is a clear misstatement of the record. The victim letters were attached by the State to "its" sentencing memorandum which were filed with the clerk prior to the sentencing hearing pursuant to §921.143, Fla. Stat. (R.980).

Indeed, the trial court stated that he did not recieve a sentencing memorandum from the State until moments before sentencing (R.682). Furthermore, the trial court had already prepared his own sentencing memorandum before sentencing. There is, therefore, no indication from the record that the trial judge attached the victim letters to his sentencing memorandum.

The State would also assert that even though the trial judge read the letters, there is no indication that he considered them. In Alford v. State, **355** So.2d 108 (Fla. 1977), this Court held that,

> In considering the imposition of the sentence, the trial judge's discretion is guided and channeled by statute and case law. He may be "aware" of other factors, but he does not "consider" these factors in the exercise of his discretion. For example, the judge may be "aware" of inadmissible evidence after a proffer has been made, but this evidence is never "considered" by the judge.
>
> **355** So.2d at 109.

Again, in Harvard v. State, **414** So.2d **1032** (Fla. 1982), this Court stated,

> Furthermore, trial judges are routinely made aware of information which may not be properly considered in determining a cause. Our judicial system is dependent upon the ability of trial judges to disregard improper information and to adhere to the requirements of the law in deciding a case or in imposing a sentence.
>
> **414** So.2d at **1034.**

In absence of any evidence supporting the proposition that the trial judge considered the letters, it must be presumed that he followed the law in imposing the instant sentence of death.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN FINDING THE HOMICIDE TO BE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL?

Appellant contends that the trial court erred in finding the murder of Carol Harris to be especially heinous, atrocious or cruel. The State contends otherwise.

In the case sub judice, Appellant approached the victim as she was getting into her car, put a gun to her head, and forced her into her car (R.1077). As the two were traveling east, away from town, Appellant fired one shot into the victim's abdominal region. Appellant alleges that the shooting was the result of the victim's attempting to stab Appellant with a knife (R.1077). However, no knife (or object resembling a knife) was found in the vehicle (R.290).

Shortly thereafter, Appellant pulled off Highway 301. The victim begged Appellant to take her to the hospital (R.1077). Appellant, however, dumped the still-living victim from the car and dragged her some seventeen feet into the ruins of an abandoned dairy (R.165, 173).

Dr. Lee Miller, an Associate Medical Examiner for Hillsborough County, testified that "the cause of death was a gunshot wound to the abdomen." (R.205). Dr. Miller further opined that the victim could have remained alive for more than an hour, and that she could have remained conscious during most of that time (R.205).

The trial court found the killing to have been especially heinous, atrocious or cruel pursuant to §921.141(5)(h), Fla. Stat. (1985) (R.978).

This Court has held that where, as here, the victim did not die instantly after being wounded, but suffered before dying in anticipation of death, such a finding that the murder was heinous, atrocious or cruel was proper. See, Mason v. State, 438 So.2d 374 (Fla. 1983); Washington v. State, 362 So.2d 658 (Fla. 1978); Routly v. State, 440 So.2d 1257 (Fla. 1983). But see, Teffeteller v. State, 439 So.2d 840 (Fla. 1983).

Teffeteller is distinguishable from the present case in that the victim in Teffeteller died shortly after being shot. The evidence sub judice indicates that the instant victim languished for as much as an hour before dying. Furthermore, the fact that Appellant laid in wait for the victim constitutes "additional facts" in justifying the application of this aggravating factor. See, Harvard v. State, 414 So.2d 1032, 1036 (Fla. 1982).

Should this Court find that §921.141(5)(h) was misapplied in the present case, the State contends that the trial court would have imposed the death sentence anyway despite exclusion of this aggravating factor; thus, any error present as to this issue should be considered harmless. Indeed, the record is clear that the trial court's main reason for overriding the jury's recommendation of life was his knowledge of the additional aggravating factor of Appellant's prior conviction for another first-degree murder (R.690).

ISSUE V

WHETHER THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH OVER THE JURY'S RECOMMENDATION OF LIFE.

In the case sub judice, the penalty phase jury recommended a sentence of life by a vote of 8 to 4. (R.666) On October 11, 1985, the trial court had before it the sentencing of Appellant for his two convictions of first-degree murder. (R.673-698) As to the Arbelaez murder, the trial court found as an aggravating circumstance Appellant's prior conviction of another capital felony, namely, the instant conviction. (R.684) He noted, however, that the instant murder was committed after the Arbelaez murder; therefore, he found that before the Arbelaez killing, the Appellant had never committed a criminal offense. (R.615-616) The trial court also found as an aggravating circumstance that the Arbelaez murder was committed during Appellant's commission of a robbery. (R.685) The trial cound found in mitigation that Appellant was under the influence of an emotional disturbance, and that at the time of the offense, Appellant was 18 years old. (R.685) The trial court found that the aggravating circumstances did not outweigh the mitigating, and he overrode the jury's recommendation of death and sentenced Appellant to life imprisonment. (R.686)

As to the present sentence, the trial court found in aggravation, (1) Appellant's previous conviction of another capital felony (the Arbelaez murder); (2) the present murder was

committed while the Appellant was engaged in a kidnapping **(R.689);** (3) the present felony was committed for pecuniary gain; and **(4)** the present killing was especially heinous, atrocious and cruel. **(R.686-688, 978-979).** The trial court found the same mitigating circumstances in the instant case as he did in the Arbelaez case, namely **§921.141(5)**(b) and (g), **Fla.** Stat. **(1985). (R.687-688, 978-979)** The trial court found that the aggravating circumstances "substantially outweighed" the mitigating, and he thereupon overrode the jury's life recommendation by sentencing Appellant to death. **(R.690)**

Appellant contends that the trial court erred in overriding the jury's life recommenation in light of Tedder v. State, 322 So.2d **908** (Fla. **1975),** that the trial court failed to consider the non-statutory mitigating evidence presented to the jury, and that the instant sentence of death was not proportional to other decisions of this Court. Appellant's contentions are unavailing.

In Tedder, this Court held,

> "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."
>
> 322 So.2d at **910.**

The State would assert that the facts in the instant case are so clear and convincing, that any reasonable person (or jurist) would find death to be the appropriate punishment, Tedder notwithstanding.

Sub judice, the trial court had before it the additional

aggravating factor which was not considered by the jury, namely Appellant's prior conviction of another capital felony. Indeed, this additional factor was the main reason for the trial court's override **(R.690)** The State, therefore, strongly contends that if this jury had before it Appellant's other conviction for first-degree murder, it surely would have recommended a sentence of death as did the Arbelaez jury which had the additional factor of the instant conviction.

In White v. State, **403** So.2d **331** (Fla. **1981),** this Court (while acknowledging Tedder) affirmed the lower court's override of that jury's life recommendation and stated,

> In arriving at a conclusion contrary to the jury recommendation the trial judge noted that as a result of the presentence investigation and information presented at sentencing he was made aware of a number of factors which the jury did not have an opportunity to consider. Among these factors were the defendant's prior conviction of a violent felony (attempted rape) and the fact he was still on parole at the time the offenses in this case were committed (aggravating circumstances (5)(a) and (5)(b) supra), which circumstances were not established before the jury but were established before the judge at the time he rendered sentence. The trial judge also found that the defense counsel's vivid description to the jury on the effects of being electrocuted was calculated to influence **a** life sentence through emotional appeal. The court concluded that the death sentence was appropriate in light of the overwhelming aggravating circumstances which far outweighed any possible mitigating circumstances. After careful deliberation we conclude that the death sentence is warranted.
>
> **403** So.2d at **309, 340.**

The State would respectfully suggest that this Court's recent proclivity in reversing all cases in which the trial court

overrides the jury's life recommendation amounts to a per se rule which allows the jury to become the ultimate sentencer. This procedure invites the "arbitrary and capricious" standard in capital cases which the United States Supreme Court found abhorrent in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1973). See, Justice Boyds' dissent in Brookings v. State, 495 So.2d 135, 145 (Fla. 1986).

In Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), the United States Supreme Court stated that,

> There is no constitutional requirement that a jury's recommendation of life imprisonment in a capital case be final so as to preclude the trial judge from overriding the jury's recommendation and imposing the death sentence.
>
> 468 U.S. at 460.

The court went on to say,

> Nothing in the safeguards against arbitrary and discriminatory application of the death penalty necessitated by the qualitative difference of the penalty requires that the sentence be imposed by a jury. And the purposes of the death penalty are not frustrated by, or inconsistent with, a scheme in which imposition of the penalty is determined by a judge.
>
> 468 U.S. at 462.

Furthermore, a trial court's findings in capital cases come to this Court with a presumption of correctness, and as such, should be given great weight and deference. See, Buford v. State, 403 So.2d 943, 953 (Fla. 1981).

Appellant's contention that the trial court failed to consider non-statutory mitigating evidence in sentencing

Appellant to death is unavailing. For the trial court did find and consider two mitigating circumstances before sentencing Appellant. (R.978-979) And the claim that the lower court should have found more evidence in mitigation is an argument based on speculation and not supported by the record. As such, this is an insufficient basis for challenging a sentence. See, Quince v. State, 414 So.2d 185, 187 (Fla. 1982).

As to Appellant's argument that the instant sentence of death should fall under a proportionality analysis, the State contends that the present sentence of death conforms to other similar cases which this Court found the death sentence appropriate. See, Eutzy v. State, 458 So.2d 755 (Fla. 1984); Mason v. State, 438 So.2d 374 (Fla. 1983); Washington v. State, 362 So.2d 658 (Fla. 1978).

CONCLUSION

Based on the foregoing arguments and citations of authority, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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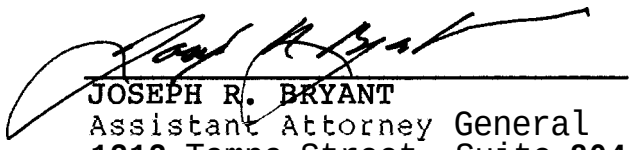
ATTORNEY GENERAL



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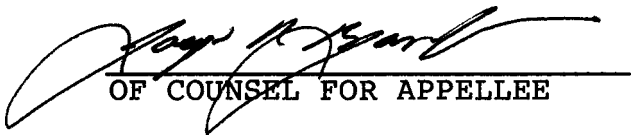
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Douglas Connor, Assistant Public Defender, Hall of Justice Building, Post Office Box 1640, Bartow, Florida 33830, this 20th day of March, 1987.



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