IN THE FLORIDA SUPREME COURT

JOSEPH HENRY GARRON, :

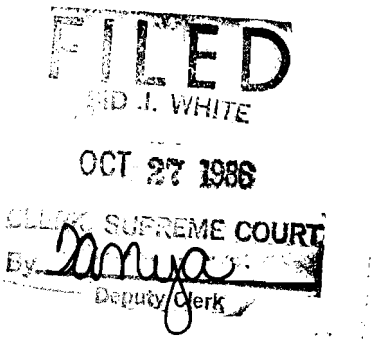
Appellant, :

vs. : Case No. 67,986

STATE OF FLORIDA, :

Appellee. :

:



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

REPLY BRIEF OF THE APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DOUGLAS S. CONNOR
ASSISTANT PUBLIC DEFENDER

Hall of Justice Building
455 N. Broadway - 2d Floor
Post Office Box 1640
Bartow, FL 33830
(813) 533-1184

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

STATEMENT OF THE CASE

Appellant, JOSEPH HENRY GARRON, will rely upon the Statement of the Case as presented in his Initiial Brief.

STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his Initial Brief.

SUMMARY OF THE ARGUMENT

Testimony and prosecutorial argument concerning a defendant's exercise of constitutional rights, regardless of the defense raised, is error. Appellee's argument that the error is harmless must fail because Garron's exercise of rights was a feature of the prosecution's case which almost certainly contributed to the verdict.

Where a homicide occurs in the course of a domestic confrontation, upon short reflection, the cold, calculated and premeditated aggravating circumstance is not applicable. Comparison of the facts at bar with those considered by this Court in Wilson v. State, Case No. 67,721 (Fla. Sept. 4, 1986)[11 F.L.W. 471] shows that proportionality analysis clearly points to a life sentence for Appellant.

ARGUMENT

ISSUE I

APPELLANT WAS DENIED DUE PROCESS WHEN THE PROSECUTOR WAS PERMITTED TO COMMENT UPON APPELLANT'S FAILURE TO WAIVE THE RIGHT TO BE SILENT FOLLOWING MIRANDA WARNINGS AND APPELLANT'S ASSERTION OF THE RIGHT TO BE REPRESENTED BY COUNSEL AT HIS FIRST APPEARANCE HEARING AS INDICATING SANITY.

In Brannin v. State, Case No. 67,994 (Fla. September 18, 1986)[11 F.L.W. 485], this Court explained the scope of its prior decision in State v. Burwick, 442 So.2d 944 (Fla. 1983), cert.denied, 466 U.S. 931 (1984). Succinctly, the Brannin opinion states:

> Burwick stands for the proposition that testimony about an accused's exercise of constitutional rights, regardless of the nature of the defense raised, is error. 11 F.L.W. at 485.

Appellee has urged this Court to apply a harmless error analysis under the facts at bar. Brief of Appellee, p.26. However, the basis presented, "ample evidence...from which the jury could conclude Appellant was sane" (Brief of Appellee, p.26) urges application of an erroneous standard.

As the United States Supreme Court declared regarding harmless error:

> We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Fahy v. Connecticut, 375 U.S. 85 at 86, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963).

In State v. DiGuilio, Case No. 65,490 (Fla. July 17, 1986)[11 F.L.W. 339] this Court reemphasized that in order to constitute

harmless error, the State must prove beyond a reasonable doubt that the objectionable comments did not contribute to the verdict.

At bar, prosecution witnesses repeatedly mentioned Garron's "understanding" of his Miranda rights (R188-9,203,1005-6) and his exercise of the right to counsel. (R953) Exercise of these constitutional rights was a material part of the facts in evidence included in the hypothetical propounded to Dr. Theiman. (R882,884) Most invidious was the prosecutor's closing which featured argument that exercise of these constitutional rights rebutted Garron's defense of insanity. (R1125-7,1130) Clearly, Garron's exercise of rights was a substantial part of the prosecution's case which may have played a substantial part in the jury's deliberations and thus contributed to the verdict.

ISSUES II - X

Appellant will rely upon the arguments as presented in his Initial Brief.

ISSUE XI

THE TRIAL COURT ERRED BY IMPOSING A SENTENCE OF DEATH BECAUSE THE AGGRAVATING CIRCUMSTANCES RELIED UPON IN THE FINDINGS WERE NOT ADEQUATELY SUPPORTED.

. . .

D. The Court's Finding that the Capital Felony Was Committed in a Cold, Calculated and Premeditated Manner

This Court has disapproved trial court findings of this aggravating circumstance on several occasions where the

homicide occurred during a domestic confrontation. See e.g., Herzog v. State, 439 So.2d 1372 (Fla. 1983); Wilson v. State, 436 So.2d 908 (Fla. 1983); King v. State, 436 So.2d 50 (Fla. 1983).

At bar, the evidence shows a practically instantaneous reaction in the shooting of Tina while she was on the telephone. Any reflection on Garron's part was of particularly short duration.

. . .

F. A Sentence of Death is not Proportional in the Case at Bar

In Wilson v. State, Case No. 67,721 (Fla. September 4, 1986)[11 F.L.W. 471], this Court considered a multiple homicide case with distinctive parallels to the case at bar. Both homicides were committed in the context of a domestic confrontation. In Wilson, the defendant murdered his father and five-year-old cousin and attempted to murder his stepmother. This Court approved findings that the two aggravating factors of conviction of a prior violent felony and especially heinous, atrocious or cruel, were proved. This Court also approved the trial court's finding that no mitigating circumstances were proved. The jury had recommended a sentence of death.

Nonetheless, this Court concluded that a sentence of death was not "proportionally warranted." The Wilson court explained that the murder "was the result of a heated, domestic confrontation and that the killing, although premeditated, was most likely upon reflection of a short duration." 11 F.L.W. at 472.

The same description aptly fits the facts at bar. Proportionality analysis leads even more compellingly to the conclusion that Garron deserves a life sentence because of the substantial mitigating evidence found by the sentencing court at bar compared to the absence of mitigating factors in Wilson. Accordingly, this Court should reduce Garron's sentence to life imprisonment.

CONCLUSION

Appellant will rely on the conclusion presented in his Initial Brief.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

Douglas S. Connor
DOUGLAS S. CONNOR
Assistant Public Defender

Hall of Justice Building
455 North Broadway
P. O. Box 1640
Bartow, Florida 33830-3798
(813) 533-1184

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL 33602, by mail on this 24th day of October, 1986.

Douglas S. Connor
DOUGLAS S. CONNOR