IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,044

DAVID COOK

Appellant/Cross-Appellee,

vs.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant,

* *

* *

CROSS-REPLY BRIEF OF THE STATE OF FLORIDA, AS CROSS-APPELLANT

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Assistant Attorney General
Ruth Bryan Owen R ode Building
Florida Regional Service Center
401 N.W. 2d Avenue (Suite N921)
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The State relies on the Statement of the Case and Facts set forth in its previous Brief of Appellee, subject to such additions as are set forth in the argument section of this Cross-Reply Brief.

POINT INVOLVED ON CROSS-APPEAL

WHETHER THE TRIAL COURT ERRED IN FINDING, AS A MITIGATING FACTOR, THAT THE DEFENDANT DID NOT HAVE A SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

ARGUMENT

THE TRIAL COURT ERRED IN FINDING, AS A MITIGATING FACTOR, THAT THE DEFENDANT DID NOT HAVE A SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY, WHERE THAT FINDING IS NOT SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE.

The State, in its Brief of Appellee, argued that even if any aggravating factors were found improper by this Court, any such finding should be deemed harmless because the sole mitigating factor found by the trial court - absence of a significant history of prior criminal activity - was improperly found by the trial court (Brief of Appellee, pp. 40-41). Thus, this case should be treated as one in which there are no mitigating factors. The Appellant moved to strike that portion of the State's brief, arguing that no cross-appeal had been filed. The State filed a Response, arguing that the argument should be presented in the form of a harmless error argument - i.e., the right result in the trial court, but possibly for the wrong reason - or, alternatively, that the State should be given leave to file the cross-appeal. This Court granted leave to file the cross-appeal, with the order of January 14, 1988 apparently treating the State's Brief of Appellee as the Brief of Cross-Appellant as well.

Cook, in his Brief of Cross-Appellee, argues that the State did not preserve this issue in the trial court. Initially, it should be noted that during closing arguments to the jury during the sentencing phase, the State argued that the mitigating factor of a lack of a significant prior criminal history should be rejected based on Cook's prior history of drug abuse. (R. 1127, 1133). Additionally, in discussing the aggravating factor of convictions for prior violent felonies, the prosecutor argued that the simultaneous convictions for the armed robberies established that factor. (R. 1117). If the prosecutor was arguing that those offenses established the aggravating factor of convictions for prior violent felonies, it is clear that he is simultaneously arguing and establishing that the mitigating factors of lack of a significant prior criminal history is not satisfied. Thus, the trial court was well aware of the relevant arguments and the issue was fully preserved.

Apart from the fact that the State did "preserve" this issue, there is a substantial question as to whether this is an issue that should have to be preserved. First, as a practical matter, when the court issued a final ruling, as in a final judgment or sentence, there is no longer any way to contemporaneously object; the issue is already resolved with a finality which cannot be undone. Second, the entire situation is more closely analogous to harmless error and right-for-the-wrong reason analysis. The State, in effect,

is arguing that any error as to aggravating factors would be harmless, and that the sentence itself, would still be correct. This Court has regularly acknowledged that trial courts can come to the right conclusion for the wrong reasons. See, e.g., Combs v. State, 436 So.2d 93 (Fla. 1983); Stuart v. State, 360 So.2d 406 (Fla. 1978). These cases have never asserted that the "right reason" to support the result, as perceived by the appellate court, must be a reason which was argued below. Indeed, the contrary appears to be true. In Stuart, this Court stated, "[I]f there is any theory upon which the trial court might properly have denied petitioner's motion for discharge, then the district court was correct in affirming, even though the trial court's stated or indicated reasons be erroneous." 360 So.2d at 408. The "right reason" can be asserted on appeal as long as it is revealed by the record on appeal. Robinson v. State, 393 So.2d 33 (Fla. 3d DCA 1981); Owens v. State, 354 So.2d 118 (Fla. 1st DCA 1978); Zirkle v. State, 410 So.2d 948 (Fla. 3d DCA 1982). As the rationale asserted by the State herein is obviously discernible from the record, it is a rationale upon which this Court can rely.

The State is unaware of any case in which a mitigating factor has been stricken. However, in State v. Bolender, 503 So.2d 1248, 1249 (Fla. 1987), this Court stated:

> Finding or not finding that a mitigating circumstance has been

> established and determining the weight to be given such, however, is within the trial court's discretion and will not be disturbed if supported by competent substantial evidence.

Thus, the mitigating factor must be supported by competent substantial evidence.

Sound reasons exist for subjecting improper findings of mitigating factors to appellate review. This Court, in death penalty cases engages in "proportionality review," comparing death sentences with other cases in which the death sentence was approved or disapproved. Improper reliance on mitigating factors can have an inequitable impact on proportionality just as easily as improper reliance on aggravating factors. Such review will promote greater uniformity of application of mitigating factors.

Turning to the merits of the case, the defendant was convicted of the murders of Rolando and Onelia Betancourt, burglary, two counts of attempted robbery, and one count of unlawful possesion of a firearm. The murder of Mr. Betancourt, preceded the murder of Mrs. Betancourt. Cook received the death penalty for the murder of Mrs. Betancourt.

In Wasko v. State, 505 So.2d 1314, 1317-1318 (Fla. 1987), this Court discussed both the aggravating and mitigating factors regarding prior criminal activity:

> Contemporaneous convictions prior to sentencing can qualify as previous convictions of violent felony and may be used as aggravating factors. Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984); King v. State, 390 So.2d 315 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979). These cited cases, however, involved multiple victims in a single incident or separate incidents combined in a single trial. E.g., Johnson, (attempted murder of deputy while fleeing from scene of robbery/murder); King, (attempted murder during escape several hours after robbery/murder); Lucas, (single incident resulting in murder of one victim and attempted murder of two others). In this case, on the other hand, the trial court depended on Wasko's contemporaneous conviction of attempted sexual battery upon the murder victim to find prior conviction of violent felony in aggravation. This case, therefore, is factually distinguishable from the other cases where a contemporaneous conviction has been found to be proper support for this aggravating factor. Conversely, although the court erred in finding prior conviction in aggravation, finding no significant criminal history in mitigation was proper because Wasko had no previous criminal record.

Thus, contemporaneous convictions will establish the aggravating factor and refute the mitigation factor when there are multiple victims in a single incident or separate incidents combined in a single trial. Wasko did not satisfy either of these criteria. Cook satisfies the first, as there were multiple victims - the murder and attempted robbery of Mr. Betancourt. As this case involves multiple victims in a single incident, the mitigating factor was improperly found and the aggravating factor was properly found.

Similarly, in Patterson v. State, 12 F.L.W. 528, 531 (Fla. Oct. 15, 1987), the contemporaneous conviction could not be utilized to support the aggravating circumstance because it did not involve multiple victims.

As the relevant principles, having recently been refined and clarified in Wasko, make it clear that the contemporaneous conviction for Mr. Betancourt's murder negates the mitigating circumstance and supports the aggravating circumstance, the mitigating circumstance should be stricken from the sentencing order. The striking of that reason leaves no mitigating circumstances. Hence, the striking of one or two aggravating circumstances would mean that the aggravating circumstances still outweigh the mitigating circumstances and the death penalty must be affirmed even if any aggravating circumstances are deemed improper.

CONCLUSION

Based on the foregoing, the mitigating circumstance of the absence of a significant prior criminal history should be stricken and the sentence should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

RICHARD L. POLIN
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **CROSS-REPLY BRIEF OF THE STATE OF FLORIDA, AS CROSS -APPELLANT** was furnished by mail to **GEOFFREY C. FLECK, ESQ.**, Friend & Fleck, 5975 Sunset Drive, Suite 106, South Miami, Florida 33143 on this 17 th day of February, 1988.

RICHARD L. POLIN
Assistant Attorney General

/dmc