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IN THE FLORIDA SUPREME COURT

RAYMOND LEON KOON, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 68,132

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APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

RAYMOND LEON KOON will be referred to in this brief as the "Appellant". The STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal consists of nine (9) volumes and will be referred to by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Appellee accepts the Statement of the Case and Facts set forth in the Appellant's brief as a substantially accurate account of the proceedings below with the following additions or corrections:

At page 12 of his Initial Brief, Appellant, Raymond Koon, refers to information from psychological experts appearing in the P.S.I. Report relative to Koon's alcohol abuse. All of the reports from the psychological experts concerning the effects, if any, of Koon's alcohol abuse were prepared prior to Koon's original trial in 1982 and were not relied upon at the instant trial.

SUMMARY OF THE ARGUMENT

ISSUE I: The trial court below conducted a full and fair hearing on the Appellant's request to have a private attorney subsituted in place of his Assistant Public Defender. Appellant failed to demonstrate any legal basis requiring the appointment of special counsel.

ISSUE II: Secret Service Agent Bowron's testimony regarding the Federal Magistrate's statement at the Preliminary Probable Cause Hearing was not subject to exclusion as inadmissible hearsay inasmuch as (1) it was relevant to show that the Magistraate's statement was made in Koon's presence and to show its effect on Koon and (2) to explain the Magistrate's subsequent conduct in binding the case over to the Grand Jury and (3) the testimony was merely cumulative to the evidence presented in the unobjected-to transcript of the Federal Hearing.

ISSUE III and IV: The trial court did not abuse its discretion in allowing the prosecutor to cross-examine defense witnesses on matters relating to their credibility.

ISSUE V: The appellant, Ray Koon, was not deprived of a fair trial when the trial court extended a recess to accommodate Koon's request for his "legal papers".

ISSUE VI: In sentencing Appellant, the trial court did not err in relying on the unobjected-to record of Appellant's prior convictions for aggravated assault and in disregarding the material disputed by the Appellant.

ISSUE VII: The trial court did not "blindly adhere" to the jury's recommendation of death, but made an independent reasoned judgment as to whether a sentence of death was appropriate.

ISSUE VIII: The sentence imposed by the trial judge was reached in accordance with the procedure outlined in Section 921.141, Florida Statutes, (a) Appellant's capacity to appriciate what he was doing was not diminished by the use of alcohol; (b) The trial judge considered all the evidence suggested in mitigation and was not persuaded that any mitigating circumstances, statutory or otherwise, were established; (c) The aggravating circumstance of prior violent felonies was proven beyond a reasonable doubt without regard to the pre-sentence report; (d) The trial court did not err in concluding that the murder was committed to hinder or disrupt a government function. In 1979, the victim implicated Appellant in a counterfeiting ring. One month prior to Appellant's Federal Trial, the victim was murdered; and the trial never took place due to the death of Joseph Dino and the fact that the one remaining witness refused to testify against Koon. (e) The murder of Joseph Dino was heinous, atrocious, or cruel. Appellant lured the victim from his home, beat the victim repeatedly despite the victim's

cries for help, held a shotgun to the victim, the victim questioned whether he was going to be killed, and the Appellant marched the victim to a rock pit at gun point and "blew out the victim's brains." (f) This murder was a cold, calculated and premeditated execution. Appellant arranged a meeting with the victim, obtained a shotgun prior to the meeting, beat the victim repeatedly, and transported the victim to a dark, isolated area and shot him at point-blank range. (g) The trial court's reference to Koon's "lack of remorse" was not a factor used to aggravate Koon's sentence.

ISSUE I

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S REQUEST TO APPOINT PRIVATE COUNSEL

The victim in this case, Joseph Dino, was murdered on November 21, 1979, and Raymond Koon was indicted for the first degree murder of Dino on February 16, 1982. (R 1230-1234). Koon was originally tried for the murder in 1982; however, in January of 1985, Koon's conviction was reversed on appeal because the trial court erred in requiring Koon's wife to disclose confidential communications between them. (R 1236-1241). The Florida Supreme Court's Mandate was filed with the trial court on April 12, 1985, and Koon's second trial on the first degree murder charge was set for May 14, 1985. (R 1235, 1246). At the request of the defense counsel, Assistant Public Defender O'Steen, who "did considerable pre-trial work in the [original] case but he did not represent him at trial", Koon's trial was reset for August 27, 1985. (R 1246, 1315). In August, the defense sought a continuance in order to locate a witness. (R 1320; 1379-1381). Koon's trial was finally scheduled to take place, and it ultimately did begin, on December 3, 1985. Less than a month prior to the commencement of trial, Koon filed a pro se motion for appointment of private counsel to represent him at trial. (R 1334-1339).

On November 22, 1985, the trial court conducted a one-hour hearing on Raymond Koon's pre-trial request to discharge Assistant Public Defender O'Steen. (R 1129-1165). The Prosecutor vigorously objected to Koon's eleventh-hour attempt to stall this trial and noted that Koon is notorious for utilizing this shrewd "modus operandi", i.e., finding fault with his counsel whenever it suits his purpose. For instance, one week prior to his trial in 1982, Koon filed a Motion for Appointment of Private Counsel (R 1386), and Assistant Public Defender O'Steen was replaced by private counsel Michael McDonnell. (R 1135). At trial, Koon discharged McDonnell immediately prior to closing argument, thus enabling Koon to present closing argument and testify on his own behalf without being subject to cross-examination. (R 1134-1135, 1348). Not only has Koon complained about every lawyer who has represented him in State court,[1] but his counsel in federal court has also been the subject of Koon's attacks. Attorney Ellis Rubin represented Koon on the federal civil rights charges relating to the murder of Joseph Dino. Within days of expressly stating that he was satisfied with Attorney Rubin's preformance and had no intention of trying to escape the consequences of his guilty plea, Koon repudiated his sworn statements and sought to withdraw his plea on the basis of ineffective assistance of counsel (R 1270-1275; 1276-1313).

1 In his original direct appeal to this court, Koon sought to discharge appellate counsel Thomas Biggs when Koon became dissatisfied with his representation. "Motion to Dismiss Counsel" filed with the Florida Supreme Court on July 22, 1983 Koon v. State, Case #63,322

Despite having the benefit of a full dress rehearsal and record of his original trial in 1982, Koon argued that the Public Defender's Office was unable to adequately represent him at his trial in 1985. The trial court specifically inquired of Assistant Public Defender O'Steen if there were any circumstances which would prohibit the Public Defender's Office from properly addressing this case or defending it (R 1151-1152). According to Assistant Public Defender O'Steen, his office was adequately staffed to handle its existing case load and . . .

> ". . . I know of no other case in seven years. . . that we have devoted more manpower to . . . I feel that . . . I have devoted adequate time to it and every witness that he has asked that we subpoena for trial. . . has a subpoena for trial except for one that I'm not sure of that were checking on."
>
> (R 1152).

In addition to the fact that Assistant Public Defender O'Steen originally represented Koon in 1982 (R 1380), O'Steen reviewed the 1982 trial and appellate record (R 1321) and conducted discovery anew in 1985. (R 1321-1323; 1153). Furthermore, as evidenced by the following excerpts, defense counsel O'Steen was fully prepared to represent Koon in the instant trial:

> [Prosecutor] Mr. Hollander: Do you feel that you can give a fair representation to Mr. Koon in the trial of this case?
>
> [Defense Counsel] Mr. O'Steen: I certainly do or I would have moved for a continuance or withdrawal sometime ago.
>
> (R 1153).

Notwithstanding the foregoing, in an effort to secure the special appointment of private counsel, Koon refused to cooperate with his public defender. (R 1152, 1157). Yet, when the prosecutor asked the court to advise Koon that his behavior might cause him to represent himself, Koon emphatically rejected that alternative. (R 1158).

An indigent criminal defendant has an absolute right to be represented by counsel, but he does not have a right to have a particular lawyer represent him. Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). An accused entitled to court-appointed counsel does not have a right to select a specific attorney or have the right to discharge competent and conscientious counsel. Williams v. State, 427 So.2d 768 (Fla. 2d DCA 1983). While a defendant has a constitutional right to waive counsel, Faretta v. California, 422 U.S. 806, 95 So.Ct. 2525, 45 L.Ed.2d 562 (1975), Koon expressly declared that he had no intention of representing himself. (R 1138; 1158). Thus, the trial court sub judice was faced with a defendant, who because his own refusal to cooperate, claimed that he was entitled to the special appointment of private counsel. A defendant "by unreasonable silence or intentional lack of cooperation, cannot thwart the law as to appointment of counsel." Thomas v. Wainwright, 757 F.2d 738, 742 (11th Cir. 1985).

On appeal, Koon argues that the trial court's hearing was inadequate under Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973). According to Nelson, the trial court "should

make an inquiry of the defendant as to the reason for the request to discharge. . ., if incompetency of counsel is. . . a reason. . . the trial judge should determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance. . ." Id. at 258-259. In the instant case, the trial court gave Koon full opportunity to set forth any and all complaints, allegations, facts and reasons in support of his motion to appoint private counsel. (R 1130-1134). Koon's objection was not with Mr. O'Steen, but Koon simply did not want the Public Defender as he felt that the Public Defender's Office was not prepared to handle a case of this magnitude and its office was overworked. (R 1134). The trial court below specifically addressed the claims raised by Koon and conducted an individual inquiry of defense counsel in order to dispel the defendant's concerns. (R 1150-1153). Near the conclusion of the lengthy hearing, the trial court stated "at this point I cannot find any reason to, on a legal basis to grant the motion to either have Mr. O'Steen step down or to have a private attorney appointed to represent you, Mr. Koon." (R 1156). Koon suggests that he and defense attorney O'Steen had reached an impasse. (Appellant's Brief at 21) In the analagous setting where defense counsel seeks to withdraw from representation of the accused, the trial court is given broad discretion in determining whether a motion to withdraw should be granted. Sanborn v. State, 474 So.2d 309 (Fla. 3d DCA 1985). In deciding whether to

grant counsel permission to withdraw based upon the allegation of an irreconcilable conflict between counsel and the accused, the court must consider (1) the timing of the motion, (2) the inconvenience of witnesses, (3) the period of time elapsed between the offense and trial and (4) the possibility that any new counsel will be confronted with the same conflict. Id. at 314, citations omitted. Assuming, arguendo, that Koon alleged and, further, demonstrated an irreconcilable conflict with attorney O'Steen, this scenario was not unique to Koon. Koon consistently expressed his dissatisfaction with each and every attorney ever associated with his case, and he raised an eleventh hour motion for appointment of private counsel at bar in an attempt to manipulate and subvert the orderly procedure of the courts. See, e.g. United States v. Sexton, 473 F.2d 512 (5th Cir. 1973).

In the instant case, the defendant failed to demonstrate that adequate grounds existed to warrant removal of his court-appointed counsel. See, McCall v. State, 481 So.2d 1231, 1232 (Fla. 1st DCA 1985). Furthermore, as in Jones v. State, 449 S.2d 253 (Fla. 1984) cert. denied ___ U.S. ___, 105 S.Ct. 269, 83 L.Ed.2d 205 (1984) the fault herein lies squarely on the defendant and his refusal to cooperate with court-appointed counsels in their efforts to provide legal assistance. Id. at 257. The trial court sub judice patiently entertained Koon's motion for the appointment of private counsel and specifically found that Koon failed to demonstrate any grounds warranting the appointment of substitute counsel. (R 1156). No abuse of discretion has been shown.

ISSUE II

ARGUMENT

THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY FROM SECRET SERVICE AGENT BOWRON CONCERNING THE FEDERAL MAGISTRATE'S REFUSAL TO DISMISS COUNTERFEITING CHARGES AGAINST KOON

On March 20, 1979, special agent Eljay Bowron of the United States Secret Service arrested Joseph Dino in conection with the delivery of approximately one million dollars in Federal Reserve notes. (R 196). As a result of the arrest, Joseph Dino agreed to testify and cooperate with the Secret Service in providing information about other individuals who were involved with the manufacture and delivery of counterfeit bills. (R 197-198). On or about May 4, 1979, the U.S. Secret Service arrested Charles Williams in the parking lot of a shopping mall when he delivered approximately $319,000.00 in counterfeit bills to an undercover federal agent in Hialeah, Florida. (R 198). The bills seized at the time of Williams' arrest were of a common manufacture as the notes seized at the time of Dino's arrest. (R 199). Agent Bowron observed the defendant, Raymond Koon, in the parking lot of the Shopping Mall during the William's transaction and arrest. (R 199-200). Koon was attempting to move into a position of observation concerning the Williams' transaction (R 200); however, when cars began converging on the scene, Koon immediately left the parking lot and went into a nearby department store. (R 201).

Both Dino and Williams gave sworn statements implicating Raymond Koon in the counterfeiting ring. (R 202). Based on

Agent Bowron's observations of Koon at the scene of the Williams' transaction and the two sworn statements from Williams and Dino, Bowron drafted a complaint charging Koon with possession and delivery of counterfeit currency. (R 202). A federal Magistrate issued a warrant for Koon's arrest, and Koon was provided with a copy of the complaint which identified the charges and named the two witnesses, Joseph Dino and Charles Williams. (R 204-205). On June 12, 1979, Agent Bowron saw Koon in the federal magistrate's court for the purpose of a preliminary probable cause hearing. (R 205). Following Agent Bowron's testimony at the preliminary hearing, Koon's defense counsel moved to dismiss the federal charges. (R 206). In response to the defense counsel's motion to dismiss the federal counterfeiting charges, the federal magistrate indicated that she might accept the defendant's argument if there was only one witness implicating Koon. However, inasmuch as there were two separate, independent witnesses each identifying Koon as a member of the counterfeiting operation, the magistrate indicated that she would deny the motion and bind the case over to the grand jury.

Koon argues that he is entitled to a new trial on the grounds that the trial court erred in allowing Agent Bowron to testify concerning the magistrate's statements at the preliminary probable cause hearing. For the following reasons and as evidenced by the following excerpt from the trial proceedings, the trial court did not abuse its discretion in allowing Agent Bowron to testify, over the defendant's objection, concerning the magistrate's statements at the federal probable cause hearing:

[PROSECUTOR]

QUESTION: Did the Honorable Magistrate Sorrentino explain as to why she was binding the case over for presentation to the Grand Jury?

MR. OLSTEEN: Your Honor, I object. That is hearsay.

MR. HOLLANDER: Your Honor, it goes to the elements in this case.

THE COURT: I will admit it, not has hearsay, but I'll admit it as a statement showing the state of mind, but not for the hearsay objection as to what the Magistrate said, if it was true or not true.

(R 207).

BY MR. HOLLANDER:

Q. Again, Agent Bowron, did the Honorable Magistrate Sorrentino explain why she was binding the case over for presentation to the Federal grand jury?

A. Magistrate Sorrentino stated that she would agree with the deendant's attorney's recommendation that the complaint should be dismissed if there were only one individual implicating Mr. Koon in this counterfeiting transaction; but, she stated inasmuch that there were two individuals, two independent individuals, each implicating Mr. Koon, that she felt there was probable casue to bind the case over, and in closing, she repeated, she said that she felt if there was just one, she would be influenced to dismiss, but not inasmuch that there were two independent witnesses.

Q. By independent witness, what do you mean?

A. The way Magistrate Sorrentino described it, these two individuals were not arrested together, they were individually arrested, and independently implicated Mr. Koon with respect to the counterfeiting currencey.

Q. Was the defendant present in the courtroom when she said that?

A. Yes.

(R 207-208).

Out-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted. Anderson v. United States, 417 U.S. 211, 219, 94 S.Ct. 2253 2260, 41 L.Ed.2d 20 (1974); §90.801 (c), Florida Statutes (1985). In Breedlove v. State, 413 So.2d 1 (Fla. 1982), this court noted that a hearsay objection is "unavailing when the inquiry is not directed to the truth of the words spoken, but, rather, to whether they were in fact spoken," Id. at 6. The State maintained throughout the proceedings that Koon murdered Dino in order to eliminate him as a witness in the federal prosecution. Bowron's testimony regarding the magistrate's statement was admissible in evidence to show (1) that the magistrate's statement was made in Koon's presence, and to show its effect on Koon, Breedlove, Id. at 7, and (2) to evidence the magistrate's state of mind; i.e., to explain the magistrate's subsequent conduct in binding the case over to the grand jury. §90.803(3)(a), Florida Statutes (1985). Morris v. State, 487 So.2d 293 (Fla. 1986).

In addition, the trial court had previously taken judicial notice of the transcript of the federal preliminary probable cause hearing and the transcript containing the magistrate's statement was admitted into evidence without objection as State's Exhibit 11 (R 209). Consequently, the identical statement was before the jury in the form of the transcript of the federal proceedings. As such, Agent Bowron's explanation of the circumstances giving rise to the magistrate's comments was not subject to exclusion as inadmissible hearsay.

ISSUE III

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE PROSECUTOR TO CROSS-EXAMINE DEFENSE WITNESS EDWARD ROBERTSON ON MATTERS RELATING TO ROBERTSON'S CREDIBILITY.

During cross-examination of defense witness Edward Robertson, the prosecutor impeached Robertson's credibility by showing that Robertson had been threatened by Ralph Koon, the defendant's brother, who made it known to Robertson that Ralph didn't care if Robertson lived or died. The defense objected to the state's impeachment as "outside the scope of direct examination." (R 604).

The scope of cross-examination is set forth in §90.612, Florida Statutes (1985). Subsection (2) provides:

> Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in its discretion, permit inquiry into additional matters.

See also, Steinhorst v. State, 412 So.2d 332, 337 (Fla. 1982).

For purposes of discrediting a witness, a wide range of cross-examination is permitted with regard to the witness' bias, prejudice, motives, interest, or animus, as connected with the case or parties. Nelson v. State, 395 So.2d 176 (Fla. 1st DCA 1980). Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The scope and limitation of cross-examination lies within the sound discretion of the

trial court and is not subject to review except for clear abuse of discretion. Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982).

On cross-examination, defense witness, Ralph Koon, denied threatening Robertson. (R 620). The prosecutor's cross-examination of Edward Robertson regarding statements attributed to Ralph Koon and Investigator Ed Neary was relevant on the issue of the witness' credibility, and, why he was testifying for the defendant; it further served to illustrate defense witness' Ralph Koon's bias or interest in attempting to get his brother "off" the criminal charges.

In support of his claim that he is entitled to a new trial, Koon relies on Jones v. State, 385 So.2d 104 (Fla. 1st DCA 1980), partially overruled on other grounds in Justus v. State, 438 So.2d 358 (Fla. 1983) and State v. Price, 496 So.2d 536 (Fla. 1986). In Jones, the defendant argued that the trial court erred in denying a motion for mistrial when the prosecutor asked on redirect examination if "anyone" had threatened a state's witness. The state witness denied receiving any threats in Jones, but the prosecutor insinuated that Jones, or someone connnected with him, made threats against the state witness to keep her from testifying against Jones. Further, the statements in Jones insinuated that the defendant was guilty because someone had threatened the witness.

In Price, supra, a state witness testified that she made a prior untrue statement because an individual named James Elliot threatened to shoot the witness if she told the truth; and the witness' truthful statement was relevant on the issue of the defendant's guilt. In Price, this court stated that a third person's attempt to influence a witness is inadmissible on the issue of the defendant's guilt unless the defendant has authorized the third party's action. Though the objected-to threat was also relevant to explain the prior inconsistent statement in Price, this court found that the probative value of the third-party threats to the state's witness, introduced by the state on direct examination, was outweighed by its prejudicial impact. Id., at 537.

In the instant case, both defense witness Edward Robertson and defense witness Ralph Koon, who purportedly made the threat to Robertson, were subject to cross-examination by the state concerning issues bearing on their credibility. §90.612(2), Florida Statutes (1985). Though the cross-examination was not admissible on the issue of the defendant's guilt, see e.g. Jones, it was offered and admissible on the issue of the witnesses' credibility. As such, the trial court did not abuse its discretion in overruling the defendant's objection that the examination was "outside-the-scope-of-direct".

In United States v. Abel, 469 U.S. ___, 83 L.Ed.2d 450, 105 S.Ct. ___ (1984), the Supreme Court ruled that testimony of a witness' and a party's common membership in an organization is probative of bias, even without proof that the witness

or party personally adopted the tenets of the organization. Similarly, in the instant case, cross-examination relating to the credibility of the defendant's witnesses which was probative to their, bias, interest, motives, or animus was permissible without a showing that the defendant knew about, authorized, or participated in the actions of the defense witnesses. It is within the province of the jury to resolve conficts in the evidence and determine the credibility of the witnesses. Chaudoin v. State, 362 So.2d 398 (Fla. 2d DCA 1978); Tibbs v. State, 397 So.2d 1120, 1123 (Fla. 1981). Sub judice, the trial court did not abuse its discretion in allowing the prosecutor to cross-examine the defense witnesses concerning matters relating to their credibility.

ISSUE IV

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE PROSECUTOR TO QUESTION DEFENSE WITNESS RALPH KOON ABOUT RALPH KOON'S STATEMENTS TO STATE WITNESS J.L. KOON

During cross-examination of defense witness Ralph Koon, the prosecutor inquired, without objection, about Ralph Koon's statements during a telephone conversation with J.L. Koon on October 16, 1981. (R 621). After Ralph Koon denied the statements attributed to him and stated that he did not even know the U.S. District Attorney, the defense counsel requested a bench conference. (R 621). The defendant's objection to the prosecutor's questioning was ". . . I don't see where it is any threat, or anything like that, whether he called someone a bastard or not." (R 621). At the bench, the prosecutor advised the court that it was necessary to lay the proper predicate -- i.e. date, time, and place -- in order to bring in the prior statements regarding Ralph Koon's interest in getting Ray Koon "off the criminal charges." (R 621-622). Following the bench conference, the prosecutor asked only two additional questions of Ralph Koon, to wit:

BY MR. HOLLANDER:

Q. Mr. Koon, do you love your brother, Ray?

A. Yes, I love him very much.

Q. And you would do anything to get him out of this; wouldn't you?

A. No, sir, I would not.

(R 623).

Appellant complains because the prosecutor questioned Ralph Koon about statements Ralph Koon made in a telephone conversation to J.L. Koon. The prosecutor's line of questioning was necessary to explore Ralph Koon's bias and interest in the outcome of Ray Koon's case, and, therefore, appropriately allowed at trial . §90.612(2), Florida Statutes (1985). §§90.608 and 90.614, Florida Statutes.

The right to ask any particular question on cross-examination relative to a collateral matter is within the discretion of the trial court. Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981). Appellant argues that the prosecutor insinuated impeaching facts never proved. Though the prosecutor assured the court of the existence of the tape, Ralph Koon's statements were contradicted by the testimony of J.L. Koon. Thus, the tape would be merely cumulative to the evidence already presented.

In Smith v. State, 414 So.2d 7 (Fla. 3d DCA 1982) the court ruled that any error in the prosecutor's questions insinuating impeaching facts never proved, was waived, where the defendant's objection was that the witness could not be impeached by an unrecorded oral statement not witnessed by a third party and where the defendant never moved for a mistrial, or registered any complaint, when no impeaching testimony was introduced. In the instant case, the defendant objected on the ground that "I don't see where its any threat. . . ", a mistrial was neither sought, nor warranted, and there was no complaint, nor, basis for any complaint, when the tape was not introduced.

ISSUE V

ARGUMENT

THE TRIAL COURT DID NOT ERR IN EXTENDING ITS RECESS DURING TRIAL TO ENABLE THE DEFENDANT, RAYMOND KOON, TO OBTAIN "LEGAL PAPERS" PRIOR TO TESTIFYING ON HIS OWN BEHALF.

At the conclusion of George Burton's testimony, the trial court announced a five minute recess. (R 753). After the jury was excused, the trial court inquired of Koon whether he was going to be the next witness to testify and stated:

> THE COURT: ". . . the main thing that I want to put on the record is that you don't have to testify.
>
> THE DEFENDANT: I definitely want to testify.
>
> THE COURT: And you understand that the State has the right to cross-examine you?
>
> THE DEFENDANT: Yes, but before we do that, let me go get my legal papers out of my jail cell, or send someone over there for them.
>
> THE COURT: Okay, we will go ahead and take a five minute break, and if after you have returned, you want to take a five minute break, you are welcome to do so.
>
> (Whereupon, court was in recess at 11:00 a.m.)
>
> (Whereupon, pursuant to the adjournment for the recess break, court resumed in the presence of the jury at 11:25 a.m.)
>
> THE COURT: Let me go ahead and ask this. Does the defense have any more witnesses to call?
>
> MR. OSTEEN: Yes, Your Honor. At this time, the defense wishes to call Raymond Koon, the defendant to the stand.

THE DEFENDANT: Well, I am not ready.

THE COURT: Well, it has been almost thirty minutes, since we took the last break, so, Mr. Koon, if you wish to testify -- you can get help from somebody if you need it -- but, we need to go ahead and proceed now.

(R 754-755).

Relying on the foregoing exchange, Koon argues that he is entitled to a new trial because his right to testify was rendered "meaningless" by the trial court's action. (Brief of Appellant at 35). As the excerpt from the trial transript demonstrates, the trial court gave Koon ample opportunity to retrieve his "legal papers" from his jail cell and offered Koon the opportunity to get help from someone else if necessary. (R 754-755). In light of the extensive background of this prosecution -- including over a week long trial in 1982, the availability of a complete appellate record of the original proceedings -- tantamount to a full dress rehearsal, a trial commencing six years after the murder, and the defendant taking the stand after several days of testimony, Koon cannot credibly maintain that he was called to testify before he was ready to do so.

Cutter v. State, 460 So.2d 538 (Fla. 2d DCA 1984) and Hall v. Oakley, 409 So.2d 93 (Fla. 1st DCA 1982), upon which Koon relies, are cited for the proposition that an accused in a criminal case has a fundamental right to testify on his own behalf. Article I, §16, Florida Constitution. Of course, this is true. Here, Koon was never denied the opportunity to testify on his own behalf and the trial court generously extended a recess to accommodate Koon's request.

Subsequent to the jury's verdict in the instant case, the trial court stated:

> ". . . it is important to point out that the Court allowed the defendant a reasonable amount of time to review his transcript and notes from the prior trial, and previous testimony that he may have given, before he testified himself, which again, was against the advise of his counsel, but which he demanded to do. In fact, before he took the stand, he was still reviewing his testimony, and even though he had read it the night before, he was given almost twenty-five minutes, from five after one until about 1:30, for a last minute review, and we had the jury waiting in the jury room while he had his last minute review. The point is that if this case is to be overturned, so be it, but it won't be for the Court not bending over backwards to accommondate the defendant and to give the defendant his opportunity to express his opinion to a jury of citizens.
>
> (R 1124).

Sub judice, there is no merit to Appellant's claim that the trial court abused its discretion in refusing to delay the orderly proceedings of the court any further in order to accommodate Mr. Koon.

ISSUE VI

ARGUMENT

THE TRIAL COURT DID NOT ERR IN RELYING ON THE RECORD OF KOON'S PRIOR CONVICTIONS CONTAINED IN THE P.S.I. REPORT IN SENTENCING THE DEFENDANT

During the sentencing hearing, the trial court advised Koon that he had the right to question any part of the court's sentencing order. (R 1211). When Koon disputed the truth of the allegations contained in the PSI report, the trial court repeatedly advised Koon that the only thing contained in the PSI report upon which he relied in preparing the sentencing order was the record of Koon's prior convictions. (R 1216, 1217, 1218, 1220, 1221).

In Alford v. State, 355 So.2d 108 (Fla. 1977) this court, relying in part on Gardner v. State, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) acknowledged the ability of the sentencing Judge to disregard disputed material in imposing sentence. In Gardner, the court stated:

> "In those cases in which the accuracy of a report is contested, the trial judge can avoid delay by disregarding the disputed material."

Alford, 355 So.2d at 109.

In considering the imposition of a sentence, the trial court may be "aware" of certain other factors, but he does not "consider" these factors in the exercise of his discretion. In the instant case, as in Alford, though a judge may be "aware" of contested factors, if he does not "consider" those factors in the exercise of his discretion, his sentence must stand. Id. at 109.

Sub judice, the trial court stated thoughout the sentencing proceedings that he did not rely on the contested matters, and the only factors taken from the PSI report were those relating to Koon's prior convictions for violent felonies. (R 1216-1218; 1220-1221).

Notwithstanding the trial court's rejection of the contested matters, should this court have any doubt concerning the nature or significance of the contested matters, Appellee will review each disputed claim individually:

(1) Koon disputed the trial court's finding that he was sentenced to seventy-five (75) years in the Federal Prison System (R 1212, 1213; 1417).

According to Koon's admission at the sentencing hearing, he was sentenced to 80 years imprisonment. (R 1213).

(2) Ray Koon contended that the P.S.I. Report placed him in Columbia County (R 1213).

At page 12 of the P.S.I. Report the statement is made "In August, 1979 co-defendant Joseph Lester Koon had provided information reference Raymond Koon's counterfeiting activities in Columbia County." J.L. Koon's trial testimony revealed that he disclosed evidence of Ray Koon's counterfeiting scheme to the Columbia County authorities (R 326, 322); there was never any claim that Ray Koon was actually present in Columbia County.

(3) Koon disputed the statement in the P.S.I. that Michael Blanco observed George Burton cutting up a shotgun. (R 1214, P.S.I.-16).

Testimony was presented at Koon's trial about the cutting and disposal of the shotgun (R 393-394; 568-569).

(4) Koon disputed the allegation that his wife, Peggy Koon, delivered gasoline to him and was instructed to stay in the truck while Koon walked down a dirt road to bring the gas to J.L. Koon. (R 1215; P.S.I. -16).

At trial, Peggy Koon testified that she took the gasoline to Koon and waited in the truck until Koon returned with J.L.. (R 513-518).

(5) Koon disputed the allegation that Lois Purvis said that Koon admitted killing Dino. (R 1216).

At trial, Lois Purvis testified that she asked Ray Koon if he killed Joseph Dino and Koon said "I goddamn sure did, and I would do it again if I had to." (R 445-555).

(6) Koon disputed the allegation that he shot at his wife, mother-in-law or stepson (R 1215-1217).

During the penalty phase of trial, the State introduced certified copies showing Koon's prior convictions on five counts of Aggravated Assault. (R 1097). The exhibits were offered and received, without objection, in order to establish that the defendant was previously convicted of a felony involving the use or threat of violence to a person, a statutory aggravating circumstance under Florida Statute §921.141(5)(6). (R 1097-1098, 1203).

(7) Koon disputed the statement that it took four canisters of tear gas to roust him from the house. (R 1219).

Koon argued that it wasn't four canisters -- it was six canisters of tear gas. (R 1219).

(8) Koon disputed the allegation that he was charged with counterfeiting since "the case was closed down, and I was never convicted of any counterfeiting." (R 1219, 1220).

The Federal counterfeiting charges were dismissed against Koon because Joseph Dino was

murdered and Charles Williams refused to testify. (R 213-214)

(9) Koon denied burning down his wife's home as retaliation for her testimony to law enforcement. (R 1222).

The arson charges were dismissed, pursuant to Koon's plea in the Federal Civil Rights case (P.S.I.-3a); the trial court relied on the P.S.I. solely for the convictions for prior felonies. (R 1414-1415;1216-1218, 1220-1221).

In light of the nature of the contested information, the evidence at trial refuting Koon's selective and favorable treatment of the disputed issues, and the fact that the only information in the P.S.I. on which the trial court relied pertained to the unobjected-to record of Koon's prior convictions, the Appellant's argument must fail.

ISSUE VII

ARGUMENT

THE TRIAL COURT DID NOT ERR IN AGREEING WITH THE JURY'S RECOMMENDATION IN SENTENCING KOON TO DEATH

Appellant, Ray Koon, contends that the Court "blindly adhered" to the recommendation of death by the jury and failed to make an independent reasoned judgment as to whether a sentence of death would be appropriate in this case.

In LeDuc v. State, 365 So.2d 149 (Fla. 1978), this Court conisdered the standard of review of the death sentence where the jury recommends death and stated:

> The primary standard for our review of death sentences is that the recommended sentence of a jury should not be distrubed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation. On the record placed before the jury in this case, a recommended sentence of death was certainly reasonable. Indeed, the only data on which a life recommendation could have been made would have had to be grounded on the nonevidentiary recommendation of the prosecutor and the emotional plea of defense counsel.
>
> (365 So.2d at 151).

Koon compares the instant case to Ross v. State, 383 So.2d 1191 (Fla. 1980), in which this court found that the trial court did not make an independent judgment whether the death sentence should be imposed. This finding was based upon the trial court's order in Ross which stated:

> This Court finds no compelling reason to override the recommendation of the jury. therefore, the advisory sentence of the jury should be followed.
>
> (386 So.2d at 1197).

This Court concluded that the trial court had felt compelled to impose the death penalty in Ross because the jury had recommended death to be the appropriate penalty. Id. at 1197.

In the case at bar, Koon ignores the critical distinction between this case and Ross. Although the Court recognized that the jury's unanimous recommendation represents the judgement and views of the community with respect to the appropriate penalty, and by law should be considered, the Court also made its own determination of the appropriate sentence, independent of the jury's recommendation, based upon consideration of the statutory aggravating and mitigating circumstances if shown by the evidence in accordance with §921.141, Florida Statutes[1].

---

1 The State contends that so long as an independent reasoned judgment as to the appropriate sentence is made by the trial court, consideration of the jury's recommendation is appropriate. See, Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (which stated: "A jury recommendation under our trifurcated death penalty statute should be given great weight.") Indeed, the United States Supreme Court, in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), noted the advisory role of the jury's recommendation under the Florida Statute, but noted further that the actual sentence was determined by the trial judge. This procedure was held to meet the constitutional deficiencies identified in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 3465 (1972). Therefore, the State contends so long as the trial court's decision does not depend so heavily upon the jury's recommendation, that the basis upon which the death penalty is imposed cannot be determined, then the constitutional problems of Furman are avoided, and consideration of the recommendation is permissible.

The trial court stated:

> The Court, having heard all of the evidence in this case, and having had the benefit of an Advisory Sentence found and returned by the Trial Jury herein, recommending by a vote of seven (7) to five (5) that the sentence of death be imposed against the Defendant, the Court hereby makes its findings as to each of the elements of aggravation and/or mitigation which are set forth in Florida Statute 921.141 and which were guidelines for the jury in considering its Advisory Sentence. (Emphasis added)

(R 1412)

The trial judge, considering only the evidence presented to the jury, found four statutory aggravating circumstances, and he found no circumstances, statutory or otherwise, which outweighed any aggravating circumstances to justify a sentence of life imprisonment. (R 1413). The trial court's evaluation independent of the jury's recommendation is consistent with LeDuc and distinguished this case from Ross. There is nothing in the Court's order to suggest that the trial court imposed the death penalty because it felt compelled to do so by the jury's recommendation.

Even if this Court concludes that the trial court gave undue weight to the jury's recommendation of death and did not make an independent judgment of whether the death penalty should be imposed, or that the findings of the trial court and weight accorded the recommendation are unclear, this case need not be remanded for resentencing. This Court may, on the record before it, constitutionally reweigh the aggravating and mitigating circumstances and make a determination in this case that death is the proper sentence. Although this Court has expressed an unwillingness to engage

in an independent evaluation and reweighing of the aggravating and mitigating circumstances [See, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981)], this Court has in effect done so, and upheld a death sentence upon that basis. Goode v. State, 365 So.2d 381 (Fla. 1978). The United States Supreme Court later sanctioned the independent reweighing of the aggravating and mitigating circumstances by the Florida Supreme Court in Wainwright v. Goode, 464 U.S. 78, 78 L.Ed.2d 187, 104 S.Ct. 378 (1983).

The State is not suggesting that in every case this Court should engage in such an independent evaluation, casting aside the careful deliberation of the jury and trial judge. Compare, Hargrave v. State, 366 So.2d 1 (Fla. 1978). But where this Court finds that there has been a material departure by the trial court or jury from their proper function described in Florida Statute §921.141 such an independent evaluation of the aggravating and mitigating circumstances should be conducted by this Court to determine whether the sentence imposed was appropriate under the circumstances, and should be affirmed.

Accordingly, even if this Court concludes that undue weight was given to the jury's recommendation of death in this case, review of the aggravating and mitigating circumstances clearly demonstrates that the sentence of death is appropriate and should be affirmed.

ISSUE VIII

ARGUMENT

THE SENTENCE IMPOSED BY THE TRIAL JUDGE WAS REACHED IN ACCORDANCE WITH THE PROCEDURE OUTLINE IN SECTION 921.141, FLORIDA STATUTES

Florida law provides for a separate sentencing procedure once a defendant has been convicted of capital murder. At this sentencing hearing the jury and/or the judge are presented additional evidence which is relevant to the nature of the offense and the character of the defendant. This court has held on a consistent basis that death is the appropriate sentence where there is one or more aggravating circumstances and no mitigating circumstances. See i.e., Blanco v. State, 452 So.2d 520 (Fla. 1984); Sireci v. State, 399 So.2d 964 (Fla. 1981) and Alford v. State, 307 So.2d 433 (Fla. 1975).

As will be discussed below the trial court properly found four (4) aggravating circumstances had been established beyond a reasonable doubt. While the defense argued two mitigating circumstances, neither was established by the evidence. It is the duty of this Court to review each capital murder resulting in a sentence of death to determine if there are clear and convincing reasons warranting imposition of this penalty. Harvard v. State, 375 So.2d 833 (Fla. 1977) and Antone v. State, 382 So.2d 1205 (Fla. 1980). This review is to find out whether the jury and trial judge acted with procedural

rectitude and to ensure relative proprotionality among death sentences. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). The State submits that the jury and judge followed all procedural requirements, and the facts and circumstances of this case justify imposition of the death penalty.

A

THE TRIAL COURT PROPERLY HELD THE MITIGATING CIRCUMSTANCE OF DIMINISHED RESPONSIBILITY HAD NOT BEEN ESTABLISHED

The defense argued in mitigation that his use of alcohol diminished his sense of responsibility. The evidence at trial concerning use of alcohol came from Koon and his family members. The pre-sentence investigation report refers to the psychiatrist's report prepared prior to Koon's original trial in 1982 indicating that Koon was an alcoholic. However, there was no showing that Koon's alcoholism was so extreme as to impair the defendant's reasoning.

J.L. Koon, the defendant's nephew, testified that Ralph Koon and Ray Koon drank beer and liquor during the day of the murder. J.L. stated they were high but not drunk. Appellant's wife did not testify concerning any drinking on the night in question. She did say, however, appellant had a serious drinking problem, but he was able to work and be a good husband and father. Appellant's brother, Ralph Koon, stated Ray Koon was intoxicated after the hunting party. And Ray Koon claimed he was having trouble walking after the hunting party.

Coupled with the confliciting testimony of Koon's intoxication was the evidence of the planning and scheming that went into this murder. Koon was angry and upset because Joseph Dino was to be a witness against him in a federal counterfeiting trial. Koon had his nephew, J.L., contact the victim using a false name. After the hunting party was over, Koon placed another call to the victim, having his nephew use a false name. After a meeting was arranged, Koon drove home and got a 12 gauge shotgun. Koon then gave J.L. explicit directions to drive to the site of the meeting. Koon wore a hat with a wide brim to obscure his face. (R 361-3660. Using a pretext of seeing a bookkeeper concerning monies owed, Koon forced Joseph Dino into his vehicle. They proceeded toward Naples and stopped on a road surrounded by swamp. Koon walked the victim to a deserted lake and shot him at point blank range.

The trial judge has discretion to determine whether sufficient evidence has been introduced to show the existence of a particular mitigating circumstance. White v. State, 446 So.2d 1031, 1036 (Fla. 1984). Whether a circumstance has been proven and the weight to be given it rests with the judge. Lemon v. State, 456 So.2d 885 (Fla. 1984). Although perhaps inartfully worded, it is clear the trial judge considered all of the above evidence and concluded appellant's capacity to appreciate what he was doing was not dimished by the use of alcohol. This conclusion is supported by the record.

B

THE TRIAL JUDGE CONSIDERED ALL THE MITIGATING EVIDENCE PRESENTED

In his sentencing order the trial judge indicated he had heard all of the evidence submitted in this case. The mere fact that the judge summed up the nonstatutory evidence as that of the defendant being a good man does not support appellant's conclusion that he overlooked some of the aspects of what constituted a "good man". The defense counsel himself used this term when talking about appellant's character. (R 1108). There is no requirement that a judge outline in detail every scrap of evidence produced in order to demonstrate he considered it.

C

THE TRIAL COURT CORRECTLY FOUND APPELLANT WAS PREVIOUSLY CONVICTED OF FELONY INVOLVING VIOLENCE

The trial court's description of the events which led to the 1971 and 1979 aggravated assaults, whether contested or not, is simply surplus language. This aggravating circumstance of prior violent felonies was proven beyond a reasonable doubt without regard to the presentence report. At the evidentiary portion of the senencing hearing, the prosecutor introduced certified cipies of convictions for five aggravated assault charges. The defense did not object to their introduction. (R 1097). The prosecutor also argued this circumstance. (R 1098). More importantly, the defense admitted this aggravating circumstance existed. Appellant argued the remoteness in time of the two ocassions which gave rise to five convicitons. (R 1105-1108).

The certified copies of the convictions, and appellant's concession to the fact of prior violent felonies sufficiently established this aggravating circumstance. See, Morgan v.

State, 415 So.2d 6 (Fla. 1982).

D

THE AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED TO HINDER OR DISRUPT A GOVERNMENT FUNCTION WAS ESTABLISHED BY THE EVIDENCE BEYOND A REASONABLE DOUBT

There is no doubt in this case that the primary or dominate purpose of this capital murder was to eliminate a witness and thus prevent appellant's prosecution for counterfeiting. In 1979 the murder victim implicated appellant in a counterfeiting ring. Appellant was indicted by a federal grand jury and a trial date was set for December. Both the decedent and one Charles Williams were scheduled to testify against appellant. The trial never took place due to the death of Joseph Dino and Williams' refusal to testify.

Appellant's nephew indicated appellant knew Dino was to testify against him and commented on how much trouble that was causing. (R 346, 377). After the murder was committed, appellant said Dino could not testify now. (R 381).

The admissibility or inadmissibility of the evidence concerning the magistrate'sstatement concerning two witnesses in the counterfeiting case does not affect this aggravating circumstance. It was clearly proven by the above stated evidence. However, it must be noted that appellant's argument overlooks the language of Section 921.141(1), Florida Statutes. This sub-section provides, "Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, . . . "

E

THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS OR CRUEL WAS SUFFICIENTLY ESTABLISHED

While a single shotgun blast causing death may not in and of itself be heinous, atrocious or cruel, if it is accompained by sufficient other factors, the circumstance could be found applicable. [See, Mason v. State, 438 So.2d 374 (Fla. 1983) where a single stab wound was found to satisfy this aggravating circumstance.] This aggravating circumstance relates to the manner in which the crime was committed. While the actual death was the gun shot, we must look at how the victim suffered prior to this point. Koon takes issue withsome of the descriptive objectives used by the judge in his order, but the basic facts remain valid.

After being lured from his home on the pretext of business, decedent was beaten in a parking lot. Ray Koon, who weighed approximately 220 pounds, pinned Dino on the ground and continued beating Dino despite the victim's cries for help. Dino kept repeating "I have had enough. (R 371). Dino was sufficiently beaten to need assistance in getting into the vehicle. At one point the car was stopped in a deserted area, Koon got the shotgun out of the trunk, and Koon told the victim to get into the trunk.

Although Koon did not persist when Dino refused, it is obvious this was not a joy ride. The shotgun is now visible in the vehicle. The victim by his questioning is fully aware that his life is in jeopardy. Koon even discusses with Dino the problems caused by Dino's testifying in the

federal case. Finally, the car is stopped again in a desolate, swampy area. The victim is marched toward the rock pit at gun point.

It is clear that Dino was aware of impending doom; a factor which contributes to the atrocity of the crime. Knight v. State, 338 So.2d 201 (Fla. 1976) and Way v. State, 11 F.L.W. ____ (Fla. 1986). Scott v. State, 11 F.L.W. 505 (Fla. 1986).

Should this court find this aggravating circumstance was not established beyond a reasonable double, death is still the appropriate sentence. There are no mitigating circumstances that were sufficiently established, and there are other valid aggravating circumstances. In such a situtation, a sentence of death is proper under Section 921.141, Florida Statutes. Armstrong v. State, 429 So.2d 287 (Fla. 1983) and Antone v. State, supra.

F

THE CAPITAL MURDER WAS COLD, CALCULATED AND PREMEDITATED

In the words of the prosecutor "This crime was a premeditated execution." (R 1103). Appellant was to be tried in December on federal counterfeiting charges. The victim was to be a witness agianst him. Thus, in November, appellant with the aid of his nephew used subterfuge to arrange a meeting with the victim. Prior to meeting he (Appellant) obtained a shotgun and put it in the vehicle. After beating the victim, appellant takes him to a dark, swampy area and shoots him. These facts demonstrate the type of situation contemplated by this aggravating circumstance. McCray v. State. 416 So.2d 804 (Fla. 1983) and Combs v. State, 403 So.2d 448 (Fla. 1981).

G

THE TRIAL JUDGE DID NOT CONSIDER LACK OF REMORSE AN AGGRAVATING CIRCUMSTANCE

This exact situation where the term "lack of remorse" was discussed in the sentencing order was addressed by this Court in Suarez v. State, 481 So.2d 1201 (Fla. 1986). This Court found there had been no consideration of a nonstatutory aggravating factor since the statement on remorse was made after the court had weighed the aggravating and mitigating circumstances. The same is true of this case. The trial judge had set out the aggravating circumstances and stated there were no mitigating circumstances. He had concluded that death was the proper sentence. At the conclusion of the court's order, he states:

> "There are sufficient and great aggravating circumstances which exist to justify the sentence of death in this case. Indeed, the actions of the Defendant show a total disregard for the rights and safeties provided by our laws and constitutions to the citizens of this State. The Court truly believes that this Defendant has no remorse or misgivings for the taking of the life of Joseph Dino. His only concern and irritation is that he has been convicted through the use of evidence and testimony coming from his own relatives, and that he did not succeed and make good his scheme for properly and efficiently executing and concealing this Murder. The Defendant is deserving of no other sentence but death. . ."
>
> (R.1419)

The trial court's reliance on the four aggravating circumstances proven beyond a reasonable doubt, and the lack of any mitigating circumstances, warrants a sentence of death.

ISSUE IX

ARGUMENT

WHETHER THE APPELLANT, RAY KOON, SHOULD BE DENIED GAIN TIME BECAUSE OF NON-PAYMENT OF COURT COSTS IMPOSED PURSUANT TO SECTION 27.3455(1), FLORIDA STATUTES (1985)

Appellant, Ray Koon, argues that §27.3455, Florida Statute, cannot be applied to crimes committed prior to its effective date of July 1, 1985. In support of his claim, Koon cites the decision of the Fifth District Court of Appeal in Yost v. State, 489 So.2d 131 (Fla. 5th DCA 1986). In Yost the following question was certified to this court as one of great public importance:

> DOES THE APPLICATION OF SECTION 27.3455, FLA. STAT. (1985) TO CRIMES COMMITTED PRIOR TO THE EFFECTED DATE OF THE STATUTE VIOLATE THE EX-POST FACTO PROVISIONS OF THE CONSITUTUION OF THE UNITED STATES AND OF THE STATE OF FLORIDA, OR DOES THE STATUTE MERELY EFFECT A PROCEDURAL CHANGE AS IS PERMITTED UNDER STATE V. JACKSON, 478 So.2d 1054 (Fla. 1985)?

The resolution of this court's decision in State v. Yost, Case #68,949, will, of course, resolve the question of whether the statue violates the ex-post facto clause or whether, as the State maintains, only a procedural change has been effected. The courts of this state have always had the authority to impose costs after a conviction, see, e.g. Chapter 939, Florida Statutes. Section 27.3455 simply provides a method of collecting these costs.

ISSUE X

ARGUMENT

AN INDIGENT DEFENDANT IS ENTITLED TO NOTICE AND OPPORTUNITY TO BE HEARD BEFORE COURT COSTS CAN BE IMPOSED

In Jenkins v. State, 444 So.2d 947 (Fla. 1984), this court ruled that an indigent defendant is entilted to notice and an opportunity to be heard before costs can be imposed. The remedy is to remand the case to give the lower court an opportunity to have a hearing in accordance with Jenkins. See, Burrows v. State, 487 So.2d 77 (Fla. 2d DCA 1986); Gilford v. State, 487 So.2d 53 (Fla. 2d DCA 1986) and Foust v. State, 478 So.2d 111 (Fla 2d DCA 1985).

CONCLUSION

Based on the foregoing facts, arguments and authorities Appellant's judgment and sentence should be affirmed.

Respectfully submitted,

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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 Robert F. Moeller, Assistant Public Defender, P. O. Box 1640, Bartow, Florida 33830 this 29th day of October, 1986.

K/Blanco

OF COUNSEL FOR APPELLEE.