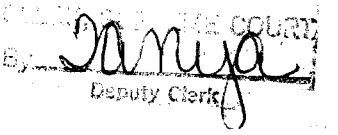
IN THE FLORIDA SUPREME COURT



RAYMOND LEON KOON, :

Appellant, :

vs. : Case No. 68,132

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant, RAYMOND LEON KOON, will rely upon his initial brief to reply to the arguments presented in the State's answer brief, except for the following additions regarding the Statement of the Case and Facts and Issues I., II., IV., V., VI., VII., VIII.A., VIII.C., VIII.D., and VIII.E.

STATEMENT OF THE CASE AND FACTS

According to Appellee, information in the presentence investigation report from psychological experts relative to Ray Koon's alcohol abuse and its effects upon him came from reports "prepared prior to Koon's original trial in 1982 and [that] were not relied upon at the instant trial." (Brief of Appellee, p. 1). However, the record on appeal does not reflect when the reports were prepared. Appellee's statement that they were prepared in 1982, therefore, reflects a matter outside the record and should be stricken.

Furthermore, the reports were still valid at the time of Koon's retrial, especially insofar as they showed the possible presence of organic brain damage, an irreversible condition.

While the reports were not used at Koon's trial itself, the presentence investigation report in which they were summarized was reviewed by the court below prior to sentencing, and so information concerning the psychological effects upon Ray Koon of his excessive consumption of alcohol was before the court for its consideration.

ARGUMENT

ISSUE I.

THE COURT BELOW FAILED TO CONDUCT AN ADEQUATE INQUIRY AND MAKE APPROPRIATE FINDINGS CONCERNING RAY KOON'S REQUEST TO DISCHARGE HIS APPOINTED COUNSEL.

At page 6 of its brief, Appellee claims that Ray Koon sought to discharge his appellate counsel during his original direct appeal to this Court. However, what Koon did or did not do in his previous appeal does not appear in the instant record on appeal, nor is it relevant to the issues involved herein.

Appellee asserts, without support, that Ray Koon's motion below for appointment of private counsel to represent him was merely "an attempt to manipulate and subvert the orderly procedure of the courts." (Brief of Appellee, p. 10) This characterization is inaccurate. Koon was, quite understandably, just trying to obtain counsel with whom he could work to prepare his defense.

Appellee calls Koon's motion "an eleventh hour motion" (Brief of Appellee, p. 10), yet it was filed more than two weeks before his trial. The motion would have been premature if it had been filed much earlier, before Koon knew whether or not his appointed counsel would be able to provide him with effective assistance.

Appellee also attempts to characterize Ray Koon as someone who was constantly trying to dismiss his attorneys. Even if this characterization were accurate, it would be irrelevant to whether or not the trial court conducted an adequate hearing in

this instance on Koon's motion for the appointment of private counsel. Appellee also ignores the fact that Koon may have had legitimate reasons for whatever efforts he made to obtain substitute counsel in other legal proceedings.

ISSUE II.

THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE AT RAY KOON'S TRIAL PREJUDICIAL HEARSAY TESTIMONY REGARDING WHAT A FEDERAL MAGISTRATE SAID DURING A HEARING ON THE FEDERAL COUNTERFEITING INDICTMENT THAT HAD BEEN LODGED AGAINST KOON.

Appellee attempts to have its cake and eat it too by arguing on the one hand that Agent Eljay Bowron's testimony as to what a federal magistrate said during a preliminary probable cause hearing was not hearsay, and on the other that his testimony was admissible under the "state of mind" exception to the hearsay rule codified in subsection 90.803(3)(a) of the Florida Statutes.

Appellee relies upon Breedlove v. State, 413 So.2d 1 (Fla. 1982) to support its conclusion that Bowron's testimony was properly admitted to show "that the magistrate's statement was made in Koon's presence, and to show its effect on Koon." (Brief of Appellee, p.14) However, in Breedlove, unlike here, the trial court cautioned the jury on how to use the testimony in question.

With regard to the "state of mind" exception to the hearsay rule, Appellee claims Bowron's testimony was admissible "to explain the magistrate's subsequent conduct in binding the case over to the grand jury." (Brief of Appellee, p.14) However, no such explanation was needed; it was irrelevant and immaterial. This is not a case

such as Morris v. State, 487 So.2d 293 (Fla.1986), cited by Appellee at page 14 of its brief, where state of mind of a government agent was relevant to the defendant's entrapment defense.

As to the transcript of the preliminary probable cause hearing in federal court that contained the magistrate's statement, this too was hearsay and should not have been admitted into evidence. Doubtless the reason defense counsel did not object to the transcript is that the trial court had already overruled his hearsay objections to the magistrate's statement, and further objection would have been fruitless. Counsel is not required to pursue a useless course of conduct in order to preserve a point for appellate review. See Bailey v. State, 224 So.2d 296 (Fla.1969); Kidd v. State, 486 So.2d 41 (Fla.2d DCA 1986).

ISSUE IV.

THE COURT BELOW ERRED IN ALLOWING THE PROSECUTOR TO ASK DEFENSE WITNESS RALPH KOON, RAY KOON'S BROTHER, WHETHER THE WITNESS HAD CALLED THE UNITED STATES ATTORNEY A "SMART-ASS BASTARD."

Appellee claims the tape recording of a telephone conversation between J.L. Koon and Ralph Koon which the assistant state attorney purported to have would have been merely cumulative to testimony already given by J.L. Koon. (Brief of Appellee, p.20) However, J.L. did not testify concerning such a conversation and, more to the point, never testified that Ralph Koon called the United States Attorney a "smart-ass bastard." (R 318-478)

With regard to the prosecutor's obligation to follow

through with introduction of impeaching evidence after laying the predicate therefor, in addition to the cases cited in Koon's initial brief, please see Tobey v. State, 486 So.2d 54 (Fla.2d DCA 1986).

ISSUE V.

THE COURT BELOW ERRED IN REQUIRING RAY KOON TO TESTIFY AT HIS TRIAL BEFORE HE WAS FULLY PREPARED TO DO SO.

At page 23 of its brief, Appellee quotes certain statements made by Judge Hayes after the jury returned its advisory sentence concerning the penalty to be imposed upon Ray Koon. The court's comments must be placed in perspective. They were made in chambers with the attorneys present, but with Ray Koon excluded. (R 1120-1121) Koon was kept out because Judge Hayes feared his remarks might "provoke some kind of disagreement or scene." (R 1121) The court then addressed several aspects of the trial, primarily matters that the record would not reflect, in a self-serving manner, apparently in an attempt to prevent being reversed on appeal. (R 1121-1126) Toward the end of his dissertation the court aptly noted that his comments had "no legal significance" and might "very well be stricken as immaterial." (R 1126) Ray Koon wholeheartedly agrees. Judge Hayes' remarks were immaterial and without legal significance, and should not be considered by this Court in evaluating the merits of Koon's appeal.

ISSUE VI.

THE COURT BELOW ERRED IN FAILING TO REQUIRE THE STATE TO PROVE MATTERS IN RAY KOON'S PRESENTENCE INVESTIGATION REPORT WHICH HE CONTESTED, AND ERRED IN FAILING TO CONTINUE KOON'S SENTENCING HEARING SO THAT HE COULD SUBPOENA WITNESSES TO DISPUTE INFORMATION APPEARING IN THE PSI.

At pages 25 through 27 of its brief the State purports to list all the matters in Koon's presentence investigation which he disputed. It should be noted, however, that the State's list is not exhaustive; Koon disputed several other matters in the PSI, as discussed in his initial brief at pages 36 through 37.

ISSUE VII.

THE COURT BELOW ERRED IN GIVING THE JURY'S DEATH RECOMMENDATION CONTROLLING WEIGHT, THUS FAILING TO EXERCISE HIS INDEPENDENT JUDGMENT CONCERNING THE SENTENCE TO BE IMPOSED, AND ABROGATING FLORIDA'S DEATH PENALTY SENTENCING SCHEME, RESULTING IN A DEATH SENTENCE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellee's attempts to distinguish Ross v. State, 383 So.2d 1191 (Fla.1980) from Ray Koon's case are unavailing. In Ross, as here, the trial court made findings in aggravation and mitigation, but allowed the jury's recommendation to interfere with his duty to arrive at an independent determination as to the appropriate penalty.

Appellee seems to suggest that Ross and LeDuc v. State, 365 So.2d 149 (Fla.1978) are somehow incompatible, and that this Court should follow LeDuc instead of Ross. However, in Ross this

Court quoted approvingly from LeDuc and did not seem to find any inconsistency between the two cases.

ISSUE VIII.

THE TRIAL COURT ERRED IN SENTENCING RAY KOON TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

The Trial Court Applied An Incorrect Legal Standard In Rejecting Ray Koon's Use of Alcohol As a Mitigating Circumstance On The Basis Of The Jury's Verdict Finding Ray Koon Guilty Of Premeditated First Degree Murder.

Ray Koon takes exception to Appellee's assertion, at page 34 of its brief, that Koon "forced Joseph Dino into his vehicle." Dino was not forced; he agreed to go to the bookkeeper's house, and Ray and J.L. Koon helped him into J.L.'s car. (R 372)

The court's finding with regard to this mitigating circumstance was not merely "inartfully worded" as Appellee claims. (Brief of Appellee, p.34) The court applied an incorrect legal standard in evaluating the effect of Koon's heavy drinking. It is not at all clear the court would have concluded that Koon's abuse of alcohol did not constitute a mitigating circumstance if the court had considered the issue in the proper light. Thus the court's finding lacks the unmistakable clarity required in capital cases. Mann v. State, 420 So.2d 578 (Fla.1982).

C.

In Finding As An Aggravating Circumstance That Ray Koon "Was Previously Convicted Of Another Felony Or Of A Felony Involving The Use Or Threat Of Violence To The Person" The Court Improperly Relied Upon Information Contained In The Presentence Investigation Report, And Improperly Considered A Non-Statutory Aggravating Circumstance.

Appellee attempts to dismiss as "simply surplus language" the trial court's recitation of alleged facts, some of which were disputed by Ray Koon, surrounding his aggravated assault convictions. (Brief of Appellee, p.35) However, this Court has held that it is proper to consider not only the fact of a conviction for a violent felony, but the circumstances surrounding the felony as well, Elledge v. State, 408 So.2d 1021 (Fla.1981), and it appears that the trial court did exactly that. Otherwise, why would he have taken the trouble to include the alleged facts in his written sentencing order?

In Williams v. State, 386 So.2d 538 (Fla.1980) and Barclay v. State, 470 So.2d 691 (Fla.1985) this Court held information contained in presentence investigation reports to be insufficient to prove prior convictions of violent felonies beyond a reasonable doubt. This principle is equally applicable to the facts allegedly supporting a conviction for a violent felony--said facts may not be proved by a PSI alone, particularly where the facts are disputed by the defendant.

D.

The Trial Court's Finding That The Killing Of Joseph Dino Was Committed To Disrupt Or Hinder The Lawful Exercise Of Any Governmental Function Or The Enforcement Of Laws Necessarily Depended At Least In Part On Inadmissible Evidence And Contained Discussion Of Erroneous And Irrelevant Facts.

Appellee cites subsection 921.141(1) of the Florida Statutes in support of its argument that hearsay testimony concerning what a federal magistrate said (please see Issue II. in the briefs) may be used to support this aggravating circumstance. However, the testimony in question was introduced at the guilt phase of Koon's trial. Subsection 921.141(1) only authorizes the admission of certain evidence at penalty phase of a capital trial. It does not authorize admission of hearsay at the guilt phase merely because that evidence may later have some applicability at penalty phase. See Jacobs v. State, 396 So.2d 1113 (Fla.1981).

E.

The Court Below Erred In Instructing The Jury On, And Finding The Existence Of, The Aggravating Circumstance Of Especially Heinous, Atrocious, Or Cruel.

The instant case is not a case such as Knight v. State, 338 So.2d 201 (Fla.1976), cited by Appellee at page 38 of its brief, where a victim is abducted at gunpoint and held for hours with the defendant controlling his every move. Joseph Dino was not kidnapped, but agreed to go with the Koons to see a bookkeeper. The shotgun was not produced until later, and no evidence showed that it was even then trained on Dino. Dino was not tortured or

mistreated during the ride, and it was not proven how long Dino was in the car with Ray and J.L. Koon.

CONCLUSION

Appellant, Raymond Leon Koon, renews his prayer for the relief requested in his initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 3rd day of December, 1986.

Robert F. Moeller
ROBERT F. MOELLER