IN THE SUPREME COURT OF FLORIDA

J. C. FEAD, SR.,

Appellant,

vs.

CASE NO. 68,341

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant was the defendant in the Circuit Court of Madison County, Florida. The State of Florida was the prosecuting authority in the circuit court and is the Appellee on appeal.

References to the record on appeal will be made by use of the symbol "R," followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case and facts to the extent presented. However, as Appellant has elected to omit certain evidence as it was presented by the State during its case-in-chief, the State would submit the following additional information for purposes of disposition of this case on appeal.

By indictment filed November 19, 1984, Appellant was charged with one count of first degree murder in violation of §782.04(1)(a), Fla. Stat. (R 1-2). A capias issued the same day indicated that there was an additional charge pending against Appellant, that of possession of a firearm by a convicted felon, case number 84-150CF (R 4-5).

Through the testimony of Reginald Jerome "Greg" Hawkins, it was established that at the time of the shooting, Appellant and the murder victim, Lisa Poole, were not living together (R 900). When Appellant returned from fishing that Saturday, October 13, 1984, he asked where Lisa was. Hawkins said she was at her grandma's house (R 902). Hawkins then left with Appellant to search for Lisa. They went to John Henry's Patio and each had a beer (R 902). Hawkins asked Appellant if he wanted to go to grandma's house and find Lisa, and Appellant said no (R 903). Hawkins noticed a gun on the seat under a brown towel. Appellant took the gun from under the towel and put it on the dashboard of the truck saying, "[w]hen I get my hands on that bitch, I'm going to kill her because I told her to stay home." (R 904).

That evening, Appellant and Lisa came over to Hawkins' apartment after going out with Hawkins' wife Joanna. Appellant and

Lisa began arguing and Hawkins threatened to call the police (R 914-915). Appellant replied, "[i]f I can't have her, nobody going to have her. I'll kill her first." (R 915) At that point, Appellant pulled a gun from his boot and attempted to shoot Lisa, who was being shielded by Hawkins (R 915-916). When Lisa jumped from behind Hawkins, Appellant shot her. Lisa fell over the side of the kitchen table and hollered and said, "Greg, please help me." (R 916) Appellant then went over to Lisa, straddled her, and shot her two more times in the head at point blank range (R 916-920). Appellant then said, "[n]ow y'all can have her, do with her whatever you want," and walked out the door (R 920).

Hawkins further testified that when Appellant was drunk "he would walk kind of wobbly, off to the side." (R 923) The night of the shooting, Appellant was not walking "wobbly," and he was talking "plain and clear." (R 924). In Hawkins' opinion, Appellant was not drunk that evening (R 925).

Joanna Poole Hawkins, Lisa's sister and Greg's wife, testified that Lisa was only 23 years old (R 961). Appellant was 45 years old. Joanna went fishing with Appellant that morning at eleven o'clock. Appellant was carrying a gun in the truck (R 962-963). Appellant was not drinking a beer when they left but stopped at the store and bought a six-pack of 16-ounce Busch beer (R 981-984). When they arrived at the fishing hole, they each opened a can of beer (R 985). After a while, Joanna poured half of her beer out and Appellant spilled half of his (R 986). They both spilled their second beers but drank all of their third beers (R 987). Later that evening, Joanna and her two sisters, Lisa and Kathy went to Monticello with Appellant to

go dancing. On the way Appellant and Lisa were drinking a half-pint of whiskey with soda (R 968). At the Hideaway Club, Appellant drank a 16-ounce beer (R 1000). He became angry because Lisa was dancing with other men (R 970). They all returned to Joanna and Greg's apartment at which point Appellant and Lisa began arguing. Joanna then told Appellant she was going to call the police to which Appellant replied, "call who you want." (R 972) After Appellant shot Lisa, he said, "[y]'all can call who you want now. I done what I had to do. Y'all can have her." (R 977). Appellant's speech was normal as was his walking ability (R 978-979). In Joanna's opinion, Lisa, who had a blood alcohol concentration of .27 (R 1125), was "pretty high" (R 989) but Appellant was not drunk (R 980).

Leslie "Chuckie" Poole, Lisa's brother, testified that he witnessed Appellant and Lisa arguing that night and tried to calm Appellant down because he was becoming violent (R 1016). As Chuckie went to call the police, he heard a gunshot (R 1018-1019). He witnessed Appellant shoot Lisa two times at point blank range and then walk out the door (R 1019-1021). Appellant did not appear drunk (R 1023-1024).

Greenville Police Officer Odel "Rabbit" Livingston testified that he had known Appellant for 30 years (R 1036). On October 14, 1984, he responded to a call at Greg Hawkins apartment at 2:30 a.m. (R 1037). Upon arrival, he noticed Appellant in a green Chevrolet pick-up truck leaving the scene. Officer Livingston radioed for an ambulance and an investigator and then pursued Appellant (R 1037).

He turned his blue lights on and pulled up beside Appellant and motioned him to pull over. Appellant pointed ahead and said, "I'm going home." (R 1038-1039) Livingston then followed Appellant home and walked with him up to the front porch. Appellant said "I know I messed up. I will be ready to go with you as soon as I take care of a little business. I have some papers I want to give my sister, and I will be ready to go." (R 1041). Appellant, followed by Livingston, then went into his house and removed some papers from a coat pocket in the clothes closet and gave them to his sister (R 1042). Appellant was then allowed to urinate in a pot in his room and was then transported by Deputy Glee in the front seat of the patrol car to the jail (R 1045-1046). Officer Livingston returned to the scene of the murder to secure the crime scene and then went back to Appellant's residence to search for the murder weapon (R 1046). Livingston could tell Appellant had been drinking (R 1048), however, he was not staggering (R 1044).

Deputy Sheriff Wesley Ross secured the crime scene and interviewed witnesses (R 1051). He accompanied Sheriff Peavy the following day to Appellant's and retrieved the murder weapon (R 1052, 1056). Upon investigating the crime scene, Ross was unable to locate any bullet holes in the floor (R 1055).

Lester Weatherington was the jailer on duty when Appellant was booked into the Madison County Jail (R 1066). Appellant did not smell of alcohol (R 1068, 1071) and, in Weatherington's opinion, he was not drunk (R 1069-1070).

Sheriff of Madison County, Joe Peavy, testified, after proffer, that he arrived at the jail around 2:30 a.m., and read Appellant his

constitutional rights of which Appellant expressly waived (R 1089-1091). Appellant stated that he threw the gun into some bushes at the crime scene (R 1092). Appellant later admitted that he hid the gun at his house (R 1096). The gun was found in some rubber boots at Appellant's home (R 1096). Sheriff Peavy testified although Appellant smelled of alcohol, he was not drunk and his speech was normal (R 1101-1103).

On November 15, 1985, the jury returned a verdict of guilty of first degree murder (R 1254). At the penalty phase held November 21, 1985, the State's only witness, Cora Howard, testified that in 1973 she saw Appellant shoot and kill Mamie Hurd (R 1271). The judgment and sentence for second degree murder was admitted into evidence (R 1272).

In mitigation, Appellant presented the testimony of Dr. Umesh Mhatre, a forensics pathologist expert. He testified that his examination of Appellant consisted of "just talking to him," and obtaining information from him (R 1295). Appellant gave Mhatre a summary of how much he had to drink throughout the day of the shooting (R 1287). Mhatre believed the information Appellant gave about the amount of alcohol he consumed, however, Mhatre did not believe a word Appellant said about the alleged accidental shooting (R 1288). Mhatre's determination that Appellant had a blood alcohol level of .25 at the time of the shooting was based on "rough estimates of how much he had drank." (R 1286).

Numerous other witnesses testified as to what a faithful employee and hard worker Appellant was (R 1300-1336).

Probation Supervisor, Troy Rhodes, testified that Appellant's record reflected that he was a model prisoner while serving time for the murder of Mamie Hurd (R 1339) and also a model parolee (R 1340). Rhodes was unaware that Appellant carried a gun in his truck and in his boot; that if he had known, Rhodes testimony would be different (R 1345).

After forty minutes of deliberation, the jury returned with a life recommendation (R 1417-1418).

Sentencing was held on November 25, 1985, at which Appellant was sentenced to death (R 1464). A written sentencing order was filed on January 17, 1986 explaining the court's findings of aggravating and mitigating circumstances (R 522-525). Appellant files this appeal challenging the trial court's override of the jury's recommendation of life imprisonment. Appellant does not challenge the conviction of first degree murder.

SUMMARY OF ARGUMENT

The trial judge did not err in rejecting the jury's life recommendation and concluding that there was no reasonable basis for such life recommendation. The trial court considered all the evidence before the jury and concluded that each of the aggravating factors outweighed the one non-statutory mitigating factor. The jury's recommendation of life was not based on any valid, reasonable mitigating factor. The sentencing judge not only may but must overrule the jury when its recommended sentence is not the appropriate sentence under the law. Appellant's sentence of death should be affirmed.

ARGUMENT

ISSUE

THE TRIAL COURT DID NOT ERR IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE AND SENTENCING APPELLANT TO DEATH.

It was the jury's advisory sentence sub judice, pursuant to §921.141(2), Fla. Stat., that Appellant be sentenced to life imprisonment (R 1417-1420). The trial court, however, after considering all aggravating and mitigating circumstances under §921.141, Fla. Stat., including "any other aspect of the Defendant's character or record, and any other circumstance of the offense," concluded that the death penalty was appropriate (R 522-525). Specifically, the court determined that the State had proven two aggravating circumstances and that Appellant had proven no statutory mitigating circumstances and one non-statutory mitigating circumstance (R 524). The court then found that the aggravating circumstances, even when weighed separately, outweighed the non-statutory mitigating circumstance and warranted imposition of the death penalty (R 524-525).

Appellant now contends the trial court erred in overriding the jury's recommendation of life because there were reasonable bases upon which the jury could have premised its advisory sentence. The general rule espoused in Tedder v. State, 322 So.2d 908 (Fla. 1975) is that 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.[1] However, it is apparent from Appellant's brief that, because of the jury's life recommendation, the sentencing judge's statutory right of override should be done away with altogether and the judge should be relegated to a role of perfunctorily accepting the jury's life recommendation without giving any consideration to aggravating and mitigating circumstances. (See Initial Brief at 20).

Section 921.141(2), Fla. Stat., makes clear that the jury's role at sentencing in a capital case is merely advisory and is not binding on the trial court. Section 921.141(3) further provides that:

> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts . . . (emphasis added)

Moreover, this Court has consistently and repeatedly held that it is the judge and not the jury that imposes sentence; the jury only recommends. Thomas v. State, 456 So.2d 454 (Fla. 1984); State v. Dixon, 238 So.2d 1 (Fla. 1973); Lamadline v. State, 303 So.2d 17 (Fla. 1974). The ultimate decision as to whether the death penalty

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1 The State would reiterate its position made in past cases that abolition of this so-called Tedder rule by this Court would be totally appropriate inasmuch as the Fifth Circuit Court of Appeals has realistically stated in Spinkellink v. Wainwright, 578 F.2d 582, 605 (1978), that ". . . reasonable persons can differ over the fate of every criminal defendant in every death penalty case." However, as desirable as the abolition of Tedder may be, it is not required in the instant case. What is required is total rejection of any suggestion by appellant sub judice that Tedder should be extended to ignoring the trial judge's sentencing order and focusing wholly on the unstated predicate of the jury recommendation.

should be imposed rests with the trial judge. Thomas, supra; Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978).

Clearly, then, pursuant to the statute governing capital sentencing proceedings as well as prevailing case law, the trial court may appropriately weigh aggravating and mitigating circumstances regardless of what the jury's recommended sentence has been. In the instant case, the trial court in its role as the ultimate sentencer considered all of the evidence that was before the jury, including the voluminous, redundant evidence offered in mitigation, and concluded that each of the aggravating factors outweighed the sole non-statutory mitigating circumstance and, thus, the death penalty was appropriate.

Nevertheless, Appellant asserts that the trial court did not give proper consideration to the jury's basis for recommending life imprisonment before the court imposed the death penalty. While there is some authority for the position that "where there are one or more aggravating circumstances and the trial judge has found no mitigating circumstances sufficient to outweigh the aggravating circumstances application of the Tedder rule calls for inquiry into whether there was some reasonable ground for a life sentence that might have influenced the jury to make such a recommendation," Thomas, supra; Lusk v. State, 446 So.2d 1038 (Fla. 1984); Stevens v. State, 419 So.2d 1058 (Fla. 1982), that authority does not suggest, as Appellant implies in his brief, that this Court engage in speculative perusals of the record in search of any circumstance which could possibly have

supported the jury's life recommendation. Tedder cannot reasonably be construed as creating a license by which the court may guess and speculate as to the basis for the jury's recommendation and, in the process, ignore the well-considered written findings of the sentencing judge. Indeed, to so construe Tedder would completely obfuscate the statutory function of the sentencing judge and, as noted above, would, contrary to clear legislative intent, reduce the trial judge's function to that of merely explaining why he concurs with a jury's recommendation of death. The Florida Legislature has not seen fit to abolish the jury override; nor has the Legislature required the jury to provide written findings in support of its sentence. Without written findings in support of the jury's sentence, such sentence is advisory and can never be given more deference than a judge's sentence supported by written findings. According such deference to a jury's advisory sentence unsupported by written findings constitutes the very arbitrariness and inconsistency condemned by the United States Supreme Court in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972).

The better approach was taken by this Court recently in Echols v. State, 484 So.2d 568 (Fla. 1985), in which it was stated that in determining, pursuant to Tedder, whether an override is based on facts so clear and convincing that virtually no reasonable person could differ, one must look at the trial court's sentencing order. Id. at 576. Appellant enumerates numerous factors in order for this Court to speculate as to why the jury recommended life, by looking at the evidence before the jury as opposed to the sentencer's order.

However, this Court will never know whether the jury's recommendation was predicated on rational or arbitrary reasons since the jury did not delineate its findings. To satisfy the constitutional standards espoused in Furman v. Georgia, and Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1976), the trial judge's sentencing order must be the order reviewed, not the unstated conclusions of the jury. Whereas here, the trial judge has determined the presence of two aggravating factors and one non-statutory mitigating factor, and his findings are not erroneous, this Court must agree that death is the appropriate sentence. Cf. Wainwright v. Goode, 464 U.S. 78, 78 L.Ed.2d 187, 104 S.Ct. 378 (1983); Parker v. State, 450 So.2d 750 (Fla. 1984); Groover v. State, 458 So.2d 226 (Fla. 1984); Johnson v. State, 393 So.2d 1069 (Fla. 1980); Spaziano v. State, 433 So.2d 508 (Fla. 1983).

The trial court specifically stated that it had considered the aggravating and mitigating circumstances enumerated under §921.141 and "any other aspect of the Defendant's character or record, and any other circumstance of the offense," and applied them to the facts of this case (R 522-525). In considering the nine aggravating factors in light of the evidence sub judice the court concluded that two of the nine were present in this case (R 523-524). The validity of the court's finding in this regard is not challenged by Appellant. However, Appellant does challenge the court's failure to conclude as mitigating circumstances, Appellant's condition and impaired capacity due to his alcohol intoxication.

Evidence of such statutory mitigation was presented at sentencing through the testimony of court appointed psychiatrist

Umesh Mhatre (R 1274-1300). The witness concluded that Appellant had a blood alcohol level of .25 at the time of the shooting and, as a result, was under extreme mental duress (R 1279) and there was a greatly diminished capacity to appreciate the consequences of his acts (R 1284). This conclusion was apparently damaged greatly on cross examination where the doctor's procedure of examination was established. Mhatre testified that his examination of Appellant merely consisted of "just talking to him" and obtaining information from him (R 1285). Appellant gave Mhatre a self-serving summary of how much he had to drink throughout the day of the shooting (R 1287). Thereafter, Mhatre determined from "rough estimates" of a similar person's alcohol intake, the Appellant had a blood alcohol level of .25 at the time of the shooting (R 1286). It was further established that Mhatre arbitrarily believed Appellant regarding his alcohol consumption, however, Mhatre, absent any reason therefor, did not believe a word Appellant said of the circumstances surrounding the alleged accidental shooting (R 1288). Moreover, throughout the trial, eyewitnesses testified that Appellant did not appear drunk at the time of the shooting or immediately thereafter (R 924, 925, 978, 979, 980, 1023, 1024, 1044, 1069, 1070, 1101-1103). The State would further submit that, where immediately after the shooting, Appellant exclaimed, "I know I messed up," and proceeded to take care of some business matters before being taken to jail (R 1041), how could any reasonable person conclude that Appellant did not have the mental capacity to appreciate the consequences of his act? Obviously the trial judge did not ignore, as Appellant asserts, the testimony regarding the

mental mitigation but rather, gave it the weight it deserved, considering all of the evidence. Mere disagreement with the force to be given such evidence is an insufficient basis for challenging a sentence. See Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); Quince v. State, 414 So.2d 185 (Fla. 1982).

The facts justifying Appellant's death sentence are so clear and convincing that reasonable persons could not differ as to the appropriate sentence. This is not Appellant's first murder. The facts surrounding the instant offense are greatly similar to those for which Appellant was convicted in 1973. In both instances, Appellant shot and killed his lover during a domestic dispute. However, in the previous offense Appellant pled guilty to second degree murder and was sentenced to life (R 54). This constituted the grounds for the trial court's finding of an aggravated circumstance under §921.141(5)(b), and properly so. Why should Appellant be permitted to kill at will, on separate occasions, two women for no justifiable reason and then plead for the mercy of the sentencing court? The evidence showed a fully intentional, premeditated murder by a convicted felon under sentence of imprisonment for an identical murder. The one mitigating factor [2] found by the court, that Appellant "was a good worker and a responsible employee," was properly concluded as

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2 The Court's finding that Appellant had violated §790.23, Fla. Stat., (possession of a firearm by a convicted felon) was predicated on the evidence and the fact that Appellant was arrested and a case number set up therefor, although he was not formally charged. This finding merely refuted evidence that Appellant was a law abiding citizen and was not considered, as Appellant asserts, a non-statutory aggravating circumstance.

having "almost no weight in relationship to the aggravating circumstances." (R 524-525) Implicit within the detailed order of the trial court is the fact that, by necessity, the court had to consider whether under the facts before him, the jury had some reasonable basis for making its life recommendation. Clearly, the trial judge concluded, based upon his own reasoned judgment, that there existed no such basis. Reasonable persons cannot differ as to the appropriate sentence for Appellant--death.

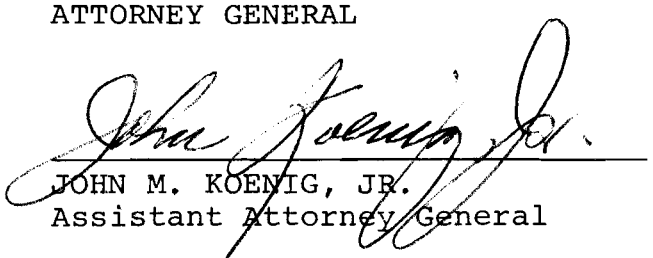
As a result, the court did not err in weighing the aggravating and mitigating circumstances in this case and overriding the jury's recommendation of life.

CONCLUSION

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

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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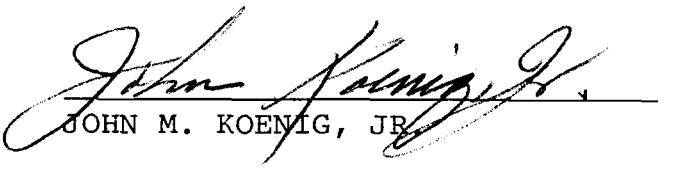
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 6th day of October, 1986.



JOHN M. KOENIG, JR.