IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 22 1987
CLERK, SUPREME COURT
By ______ Deputy Clerk

------------------------------x

ROBERT IKE COMBS, :

Appellant, :

v. : Case No. 68,477

STATE OF FLORIDA, :

Appellee. :

------------------------------x

APPEAL FROM THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

SECOND SUPPLEMENTAL BRIEF OF APPELLANT

Asa D. Sokolow
Marvin R. Lange
Richard L. Claman
575 Madison Avenue
New York, NY 10022
(212) 940-8800

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES. ii

PROCEDURAL HISTORY. 1

STATEMENT OF FACTS RELEVANT TO
APPELLATE'S HITCHCOCK CLAIMS. 3

ARGUMENT
THE TRIAL COURT IMPERMISSIBLY RESTRICTED THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE ENUMERATED IN THE STATUTE, AND IMPERMISSIBLY RESTRICTED ITS OWN CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE ENUMERATED IN THE STATUTE 5

CONCLUSION. 8

TABLE OF AUTHORITIES

PAGE

Harvard v. State, 486 So.2d 537 (Fla. 1986) 7

Hitchcock v. Dugger, ____ U.S. ____,
95 L.Ed.2d 347, 107 S.Ct. 1821 (1987) 3, 5, 6, 7

Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973,
98 S.Ct. 2954 (1978) 1, 2, 5, 7

Lucas v. State, 490 So.2d 943 (Fla. 1986) 7

McCrae v. State, No. 67,629 (Fla. June 18, 1987) . . 7

Tedder v. State, 322 So.2d 908 (Fla. 1975) 7

Witt v. State, 387 So.2d 922 (Fla. 1980) 7

IN THE SUPREME COURT OF FLORIDA

ROBERT IKE COMBS,	:	
Appellant,	:	
v.	:	Case No. 68,477
STATE OF FLORIDA,	:	
Appellee.	:	

SECOND SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT ROBERT IKE COMBS

Defendant-appellant Robert Ike Combs ("defendant") submits this second supplemental brief in support of his appeal from the denial of his motion, pursuant to Fla. R. Crim. P. 3.850, to vacate, set aside, or correct his conviction and sentence ("3.850 motion").[1]

PROCEDURAL HISTORY

Defendant was convicted of, *inter alia*, first degree murder, and was sentenced to death by Judge Thomas S. Reese, in 1980. On appeal, he argued, *inter alia*, that his death sentence was improper due to violations of *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978)

---

1 Contemporaneously herewith, defendant is filing a motion for leave to file this supplemental brief.

("Lockett"), in connection with the instructions to the jury in the sentencing phase and the trial court's consideration of sentencing. This Court affirmed the sentence, holding defendant's arguments to be "without merit." Case No. 59,425, 403 So.2d 418 (Fla. 1981).

In 1983, defendant filed his 3.850 motion. In Count V of that motion, defendant also alleged Lockett violations, also in connection with the instructions to the jury and the trial court's consideration of sentencing. The trial court denied defendant's 3.850 motion and this appeal followed.

On November 25, 1986, defendant filed in this Court a brief ("Deft. Brief") in support of his appeal from the denial of his 3.850 motion. On January 14, 1987, defendant filed a supplemental brief in support of that appeal, pursuant to this Court's Order dated December 18, 1986. On April 16, 1987, defendant filed his reply brief.[2]

Contemporaneously herewith, defendant is filing his Motion for Leave to File Supplemental Brief, to bring to the attention of this Court new authority, decided after defendant filed his reply brief, bearing directly on defendant's Lockett claims -- the United States Supreme Court's unanimous

---

2 On July 13, 1987, defendant requested that the Court accept, in substitution for the reply brief filed in April 1987, a reply brief that corrects a word processing error.

decision in Hitchcock v. Dugger, ___ U.S. ___, 95 L.Ed.2d 347, 107 S.Ct. 1821 (1987).

STATEMENT OF FACTS RELEVANT TO APPELLANT'S HITCHCOCK CLAIMS[3]

When the sentencing phase of defendant's trial commenced, the trial court gave brief introductory remarks to the jury that included the sentence:

> At the close of the taking of evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

(CR. 1121; emphasis added)[4].

At the close of argument, the court instructed the jury, *inter alia*, as follows:

> The mitigating circumstances which you may consider if established by the evidence are these: (A) that the defendant has no significant history of prior criminal activity; (B) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired; (C) age of the defendant at the time of the crime.

---

3 A fuller statement of the facts is contained in Deft. Brief at 2-8.

4 References to "CR. _____" are to the record on appeal from defendant's conviction and sentence, case number 59,425 in this Court.

(CR. 1133; emphasis added).

The court said nothing to the jury that would suggest that it could properly consider any other mitigating factors.

The jury voted for a death sentence.

Thereafter, the court sentenced defendant to death. Judge Reese's sentence contained the following language:

> This Court . . . heard and considered testimony and evidence . . . regarding the statutorily enumerated aggravating and mitigating circumstances which are to be solely and alone weighed by the Court in arriving at its decision.
>
> * * *
>
> Mitigating circumstances were based upon every scintilla of evidence reasonably tending to establish or having any probative value bearing upon the enumerated mitigating circumstances.
>
> * * *
>
> The Court has considered all of the statutorily enumerated mitigating circumstances and accordingly finds to exist mitigating circumstances pursuant to subparagraphs (a) . . . and (g) . . . . No other enumerated mitigating circumstances are found to exist by the Court.
>
> Upon consideration of the aggravating and mitigating circumstances enumerated in Florida Statute 921.141(5) and (6) . . ., it is the conclusion of this court that the aggravating circumstances substantially outweigh the mitigating circumstances and require the imposition of the death penalty.

(CR. 1157-60, CR. 1178-80; emphases added).

The Court gave no indication that it considered any other mitigating factors.

ARGUMENT

THE TRIAL COURT IMPERMISSIBLY RESTRICTED THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE ENUMERATED IN THE STATUTE, AND IMPERMISSIBLY RESTRICTED ITS OWN CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE ENUMERATED IN THE STATUTE

In Hitchcock v. Dugger, supra, the United States Supreme Court unanimously held that:

(a) instructions to the jury -- almost word-for-word identical to those present here -- that precluded it from considering nonstatutory mitigating circumstances do not comport with the requirements of Lockett, and

(b) the sentencing judge's restriction of his own consideration to statutorily enumerated mitigating circumstances -- evidenced by the court's use of language very similar to that employed by Judge Reese -- does not comport with the requirements of Lockett.

The language of the instructions and of the court's judgment in this case make it plain that the considerations of both the jury and the court were improperly restricted in

precisely the same manner as in Hitchcock, and that the sentence cannot be permitted to stand. The Supreme Court's conclusion in Hitchcock necessarily governs here.

Among the evidence of non-statutorily enumerated mitigating circumstances that the jury was improperly forbidden to consider, and that the judge improperly did not consider, was evidence that defendant was highly intoxicated on the night of the killing (although perhaps not to the extent necessary to qualify for the statutory "substantial impairment" mitigating circumstance). At the trial, there was testimony that defendant had been drinking heavily (12-20 beers) and using marijuana and cocaine (CR. 834-35, 840, 849), and was "pretty high" (CR. 851). Other non-statutory mitigating evidence in the record included defendant's having worked as a dozer operator (CR. 855), and his close family relationships (e.g., living with his brother, being visited by his father [CR. 564-65, 571, 736]).[5] In a case in which two statutory mitigating circumstances (young age of defendant, and lack of significant prior criminal history) were plainly present, it is impossible now to conclude that the jury's consideration of the non-statutory evidence that it was precluded from considering would not have altered the

---

5 As discussed at Deft. Brief 48-50, far more evidence would have been presented if trial counsel had acted effectively.

balance in favor of life, or that the court's consideration of such evidence would not have resulted in a life sentence.[6]

This Court has recognized that a Lockett/Hitchcock error requires resentencing. E.g., McCrae v. State, No. 67,629 (Fla. June 18, 1987); Lucas v. State, 490 So.2d 943 (Fla. 1986); Harvard v. State, 486 So.2d 537 (Fla. 1986). The same result is required here.[7]

---

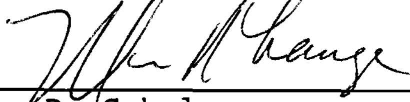
6 If the jury had recommended life, on this set of facts, where the balance between aggravating and mitigating circumstances was very close, the court could not have properly overridden that recommendation, under Tedder v. State, 322 So.2d 908 (Fla. 1975).

7 This Court's affirmance of defendant's sentence as against a Lockett attack should not preclude the Court's reversal of that sentence now. If a sentence that is now plainly unconstitutional under Hitchcock was regarded as proper at the time of defendant's initial appeal, it necessarily appears that this Court would regard Hitchcock as a change of law. Such a change is cognizable on a 3.850 motion. Witt v. State, 387 So.2d 922 (Fla. 1980).

CONCLUSION

For the foregoing reasons, as well as those contained in defendant's earlier briefs, this Court should reverse the trial court's order, and set aside defendant's sentence.

Respectfully submitted,



Asa D. Sokolow
Marvin R. Lange
Richard L. Claman
575 Madison Avenue
New York, NY 10022
(212) 940-8800
Attorneys for Defendant-Appellant

Dated: July 21, 1987

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a true and correct copy of the attached Second Supplemental Brief of Appellant on the State of Florida by causing a copy to be sent by express mail to the office of James A. Young, Esq., Assistant Attorney General, Park Trammell Building, Suite 804, 1313 Tampa Street, Tampa, Florida 33602, and John W. Dommerich, Esq., Assistant State Attorney, Twentieth Judicial Circuit, Post Office Drawer 399, Fort Myers, Florida 33902, this 21st day of July, 1987.

MARVIN R. LANGE