

IN THE SUPREME COURT OF FLORIDA

FILED
SEP 2 1987

AUG 18 1987

ROBERT IKE COMBS,)
)
 Appellant,)
)
 v.)
)
 THE STATE OF FLORIDA,)
)
 Appellee.)
)

CLERK, SUPREME COURT
By: *[Signature]*
Deputy Clerk
CASE NO. 68,477

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

SECOND SUPPLEMENTAL BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This case is on appeal to the Florida Supreme Court from the Circuit Court, Twentieth Judicial Circuit, Florida upon denial of Appellant's Motion to Vacate, Set Aside or Correct Conviction and Sentence filed pursuant to Fla. R. Crim. P. 3.850.

In this brief, the parties will be referred to by their proper names or as they stand before this Court. References to the record on appeal are indicated by the letter "R" followed by the appropriate page number. References to the supplemental record on appeal are indicated by the letters "SR" followed by the appropriate page number. References to the record on appeal from Appellant's conviction, F.S.C. Case No. 59,425, adopted as part of this record by order of this Court dated July 11, 1986, are indicated by the letters "CR" followed by the appropriate page number. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellee accepts the Statement of the Case and Facts as presented by Appellant in his Second Supplemental Brief except where specifically pointed out in Argument.

ARGUMENT

WHETHER THE TRIAL COURT IM-
PERMISSIBLY RESTRICTED THE
JURY'S CONSIDERATION AND ITS
OWN CONSIDERATION OF MITIGATING
CIRCUMSTANCES TO THOSE ENUMERATED
IN THE FLORIDA DEATH PENALTY
STATUTE.

Appellant contends that he is entitled to resentencing because the sentencing judge failed to expressly consider non-statutory mitigating circumstances in imposing the sentence of death and because the Court's instructions to the jury precluded consideration of nonstatutory mitigating circumstances. Appellant relies upon the recent United States Supreme Court decision in Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

This Court reviewed this claim on Appellant's direct appeal of his conviction and sentence. Combs v. State, 403 So.2d 418 (Fla. 1981). There, Appellant's claim under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), was rejected by this Court as being without merit. This claim, which was presented on direct appeal, cannot be reviewed in a collateral proceeding under Rule 3.850, Fla. R. Crim. P. It is well settled that matters which were or could have been raised on direct appeal

cannot be a basis for relief in post-conviction proceedings. Adams v. State, 380 So.2d 423 (Fla. 1980); Sullivan v. State, 372 So.2d 938 (Fla. 1979).

Appellant contends that his claim should be reconsidered in that Hitchcock constitutes a change of law under Witt v. State, 387 So.2d 922 (Fla. 1980). That argument was rejected by this Court in Agan v. Dugger, No. 70,589 (Fla. June 8, 1987)[12 FLW 285]. It is clear from the Court's decision in Hitchcock that the Court followed and applied its earlier decisions in Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); and Lockett v. Ohio, supra. Hitchcock is not a change of law under Witt which would permit reconsideration of Appellant's Lockett/Hitchcock claim in this case.

Appellant's claim is not reviewable for another reason. Although Appellant did state his Lockett claim in his Amended motion to vacate, (R. 501-505), Appellant failed to present any evidence in support of his claim at the evidentiary hearing and further failed to argue the claim in his Brief in Support of Amended Motion to Vacate filed in the trial court. (R. 1181). Appellant abandoned his Lockett claim by not seeking relief in the lower court. In his brief below, Appellant set out the

grounds for relief and the issues presented. (R. 1187-1188, 1190-1192). Appellant's Lockett claim was not present. It was thus abandoned, and cannot be presented to the appellate court. In Lucas v. State, 376 So.2d 1149 (Fla. 1979), this Court refused to indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law. Similarly, Appellant's abandonment of his Lockett claim precludes appellate review of this issue.

Even if this issue is reviewable, it is without merit. As the State argued on direct appeal, Appellant did not ask that the jury consider any nonstatutory mitigating circumstances. Accordingly, there can be no Lockett/Hitchcock violation, See, Aldridge v. State, 503 So.2d 1257 (Fla. 1987). The jury was instructed on each mitigating circumstance offered by defense counsel. Appellant now identifies three factors that he claims were nonstatutory mitigating circumstances that the jury was prohibited from considering and which the trial judge failed to consider.

First, trial defense counsel argued Appellant was substantially impaired in his ability to conform his conduct to the requirements of law as a result of his consumption of drugs and alcohol. (CR. 1127).

The jury was instructed that this could be a mitigating circumstance. (CR. 1133). Absent a finding of substantial impairment, the State contends Appellant's consumption of drugs or alcohol does not constitute a mitigating factor, statutory or nonstatutory. Unless such consumption causes substantial impairment of the defendant's ability to control his behavior and conform his conduct to the requirements of the law, it does not relate to the nature of the crime or the character of the defendant, so as to mitigate against the sentence of death.

Moreover, there is no evidence in the record that defense counsel wanted or intended to offer evidence of Appellant's intoxication to be considered as a nonstatutory mitigating circumstance. Defense counsel only argued that Appellant's intoxication substantially impaired his ability to control his behavior. Neither the record on appeal of the conviction or of the post-conviction proceedings establishes that defense counsel sought to offer Appellant's intoxication as a nonstatutory mitigating circumstance and that he was prohibited from doing so.

Appellant next argues that evidence of his experience as a bull dozer operator constitutes a nonstatutory mitigating circumstance not considered. This is clearly not mitigating evidence and is without merit.

Finally, Appellant asserts that evidence of Appellant's close family relations was nonstatutory mitigating evidence which should have been considered. Defense counsel did not intend to offer such evidence in mitigation. Defense counsel testified below that he made a tactical decision not to present mitigating evidence from Appellant's family members about their relationship with Appellant and about Appellant's character. (R. 279-280, 300-302).^{1/}

Appellant is unable to establish a Lockett/Hitchcock violation where, as here, there is no evidence in the record of nonstatutory mitigating evidence that the jury was precluded from considering or which the trial court failed or refused to consider and there is no evidence that defense counsel wanted to, or sought to, present nonstatutory mitigating evidence and

^{1/} See also, Answer Brief of Appellee at 39-41.

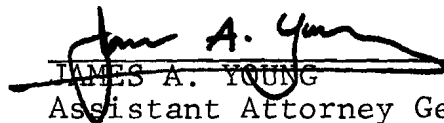
was precluded from doing so. Accordingly, this claim is without merit and does not require resentencing.

CONCLUSION

WHEREFORE, based on the foregoing reasons, arguments and authorities, the Appellee would urge this Honorable Court to render an opinion affirming the judgment and sentence of the trial court.

Respectfully submitted,

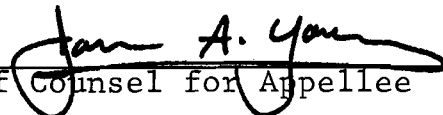
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via overnight Express Mail to MARVIN R. LANGE, ESQUIRE, Rosenman & Colin, 575 Madison Avenue, New York, New York 10022-2585 on this 11^m day of August, 1987.


Of Counsel for Appellee