

IN THE SUPREME COURT
OF FLORIDA SID J. WHITE

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CLEK, SUPREME COURT
CASE NO. B-68,493
Deputy Clerk

Carly

ANGEL DIAZ,
Appellant

vs.

THE STATE OF FLORIDA,
Appellee

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Of the seven issues defined in the Appellant's initial brief and discussed in the Appellee's brief, the majority require no further exposition, both sides having fully stated their positions and cited essentially the same case law. Three issues do require a brief further discussion herein: the effect of the defendant's shackles upon his right to a fair trial, the propriety of the trial court's allowing the defendant to represent himself, and the disproportionality of his sentence to his alleged crime. The first and second of these must be considered together, as both concern the same Constitutionally protected interest.

TABLE OF CONTENTS

Introduction.....i

Table of Contents.....ii

Table of Citations.....iii

Summary of the Argument.....1

Argument:

I. THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL
PROHIBITS HIS BEING REQUIRED TO WEAR SHACKLES WHILE
DEFENDING HIMSELF2

II. THE DEFENDANT'S INABILITY TO SPEAK OR WRITE ENGLISH,
COUPLED WITH THE SHACKLES HE WAS REQUIRED TO WEAR,
RENDERED HIM INCOMPETENT TO REPRESENT HIMSELF.....6

III. THE DEATH PENALTY CANNOT BE INFLICTED IN THIS CASE BECAUSE
THE RECORD DOES NOT PERMIT FACTUAL FINDINGS OF INTENT
REQUIRED BY THE EIGHTH AMENDMENT.....8

Conclusion.....11

Certificate of Service.....12

TABLE OF CITATIONS

Cabana v. Bullock, ___ U.S. ___, 106 S.Ct.689, 85 L.Ed.
2d 476 (1986).....8,9

Dufour v. State, 495 So. 2d 154 (Fla. 1986).....2,3

Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368,
73 L. Ed. 2d 1140 (1982).....8,9,10

Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691,
48 L. Ed. 2d 126 (1976).....2,4

Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525,
45 L. Ed. 2d 562 (1975).....4,6,7

Illinois v. Allen, 397 U. S. 337, 90 S. Ct. 1057,
25 L. Ed. 2d 353 (1970).....4

Jackson v. State, ___ So. 2d ___ (Fla. 1986) (case no.
66,671, slip op. filed Dec. 24,1986).....8,9

McCaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944,
79 L. Ed. 2d 122.....2

Zygadlo v. Wainwright, 720 F. 2d 1221 (11th Cir. 1983).....3

SUMMARY OF THE ARGUMENT

The right of self-representation and the right to be tried without shackles or prison garb are both aspects of the Sixth Amendment; in this particular situation, where the Court insisted that the defendant be shackled, the two interests were mutually incompatible. The Court placed itself in a situation where it had to choose the lesser of two evils: forcing the defendant to conduct his defense while shackled like an animal, or forcing counsel upon him. The Court's choice was an error of Constitutional dimension. Not only the shackles impaired the defendant's ability to conduct a fair defense of himself; his inability to read and speak English rendered him incompetent to conduct any meaningful defense even though he was not "incompetent" in the normal sense of the word.

Although very recent case law permits an appellate court to find that a defendant convicted of felony murder had the requisite intent to kill, even though the trial court has not made such findings, this course is rarely appropriate. In the instant case, the factual record simply does not allow such a finding to be made at the appellate level.

I. THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL
PROHIBITS HIS BEING REQUIRED TO WEAR SHACKLES WHILE
DEFENDING HIMSELF

The Constitutional principle which buttresses the well-established rule that shackles and prison garb should not be seen by jurors is technically derived from the Sixth Amendment right to a fair trial; its roots are, however, even deeper. It is based on the principle that every accused has the right to retain his individual dignity while appearing before his peers. McCaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). The State argues that the trial court made factual findings to establish that shackles were necessary in this case, and therefore Constitutionally permissible. The evidence used for this determination was, of course, hearsay which, while not inadmissible, was perhaps not as trustworthy as the Constitution requires. But even if the factual findings indicating necessity were adequate (which the appellant does not concede), the trial court nevertheless erred by permitting the defendant to represent himself while so burdened, a procedure which thrust the shackles into an impermissible prominence. All the case law on this issue, including that cited by the State, requires that trial courts minimize the jury's opportunity to see the accused in shackles, even where such restraints are really necessary. In the very recent Florida case Dufour v. State, 495

So. 2d 154 (Fla. 1986), the defendant was found to be a violent person and an escape risk; nevertheless, the trial court attempted to minimize the prejudice necessarily arising from his shackles by placing an extra table obscuring the defense table. The case does not hold that Dufour's conviction would have been affirmed without any such precautions, and is certainly not a precedent which would authorize the procedure challenged in this appeal. Neither does Zygadlo v. Wainwright, 720 F. 2d 1221 (11th Cir. 1983) furnish such a precedent, because in that case "the record did not show that the jury observed the shackles and Zygadlo could demonstrate no prejudice resulting from the trial judge's decision in light of the overwhelming evidence of his guilt," 720 F. 2d at 1223. The State has not found any authority which would permit a trial court to compel the accused to wear shackles while undertaking to represent himself, moving about the front of the courtroom between jury box, witness stand, and defense table while hampered by this most tangible badge of infamy.

The State nevertheless contends that any prejudice done to the defendant in this case by the procedure complained of herein may be disregarded because he indicated that he wanted to represent himself. This argument overlooks the fact that the right to self-representation is derived from precisely the same Sixth Amendment roots as the right to be tried without shackles

and prison garb, namely the worth and dignity of each individual. In holding that each defendant "must be free personally to decide whether in his particular case counsel is to his advantage," Faretta v. California, 422 U.S. 806,836, 95 S. Ct. 2525,2549, 45 L. Ed. 2d 562 (1975), the United States Supreme Court cited a phrase from Illinois v. Allen, 397 U. S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), describing "that respect for the individual which is the lifeblood of the law." Illinois v. Allen is, of course, a case derived from the Estelle v. Williams precedents, condemning the use of shackles and prison garb.

Assuming that the trial court found shackles indispensable in the instant case, the defendant's unexpected request to represent himself meant that the court had to decide which course was more likely to preserve his dignity as an individual -- forcing him to appear before the jury in shackles, or forcing him to appear through counsel. Common sense dictates that forcing counsel upon him would certainly be the lesser evil. For the reasons and under the authorities discussed in the appellant's initial brief, the right to self-representation had greatly diminished due to the late stage of the proceedings, whereas the right to appear before the jury without restraints did not and could not fade. Despite the defendant's expressed preference, the Court was obliged to choose the course which would best protect the defendant's personal dignity in the courtroom and insure him a

fair trial. This was a responsibility which the trial judge herein either abdicated or mishandled, to the defendant's extreme prejudice.

Even if, by his preference, the defendant could conceivably have waived this error of the trial court, no true waiver occurred in this case because the court never discussed with the defendant, in its several colloquies with him,, the strong likelihood that the jury would be biased by the sight of the defendant in chains. In this situation, no doctrine of waiver or "invited error" can excuse the trial court's failure to balance the various aspects of the Sixth Amendment rights implicated in this case, or its failure to make the obvious finding that no defendant is likely to receive a fair trial if he represents himself while encased in shackles. In addition, this State has a very powerful interest in the fairness and reliability of capital trials, an interest which could never be waived, and an interest which outweighed the defendant's last-minute desire to dispense with his counsel.

II. THE DEFENDANT'S INABILITY TO SPEAK OR WRITE ENGLISH, COUPLED WITH THE SHACKLES HE WAS REQUIRED TO WEAR, RENDERED HIM INCOMPETENT TO REPRESENT HIMSELF

Both appellant and appellee agree that competency to represent oneself is as yet poorly defined in our case law. Our only guidance is the vague Faretta description "literate, competent, and understanding," Faretta v. California, supra, 422 U.S. at 836, 95 S. Ct. at 2541. The State makes much of the fact that this defendant was found "competent" to stand trial, which he does not deny, although it is noteworthy that the trial court did not have access to that information when deciding to allow self-representation. But competence to stand trial means something quite different from competence to conduct a defense. It requires only that a defendant understand the nature of the proceedings and charges, and be able to assist counsel in preparing a defense. There are, obviously, many factors which can render a person who is competent to stand trial quite incapable of conducting his own defense. One such factor is listed in the Faretta litany -- literacy.

Clearly, preparing a defense requires reading pleadings, depositions, and other papers in English, so that a person who could not read English would be severely handicapped. During the course of the testimony, inability to understand spoken English would be an even more obvious handicap. Despite the State's attempts to have this Court reconsider the question at the

appellate level, we are obliged to accept the trial court's view of the defendant's skill in English. The judge plainly believed that this defendant would have to rely on an interpreter, would not know if the interpreter erred, and would be unlikely to make timely objections because of the delay caused by translation [TR-370-80]. Surely such a person is not "literate" in the context of Faretta.

Another attribute which should logically render an otherwise competent defendant incapable of representing himself is the presence of shackles on his person. Because shackles are a continuing affront to the defendant's human dignity, and because they are uniformly held to be very likely to prejudice a jury, courts are required to minimize the likelihood that shackles will be seen by jurors (see authorities cited in Appellant's initial brief, pp. 17-20). If granting a defendant's request to represent himself means that he must appear with his shackles in constant prominence, one must surely conclude that the defendant is afflicted with a burden that renders him incapable of representing himself in any meaningful way, as his very appearance is prejudicial. Where the defendant is both burdened with shackles and unversed in the language of the country under whose laws he is accused, he is so severely handicapped that justice cannot possibly served by granting him a hollow opportunity to "defend" himself.

III. THE DEATH PENALTY CANNOT BE INFLICTED IN THIS CASE BECAUSE THE RECORD DOES NOT PERMIT FACTUAL FINDINGS OF INTENT REQUIRED BY THE EIGHTH AMENDMENT

There seems to be no doubt that the jury instructions in this case nowhere asked the finders of fact to make the findings of intent which must be present before the death penalty may be constitutionally inflicted for felony-murder cases, see Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982). The State nonetheless contends that this Court may make such findings at the appellate level, based on the record at trial, even though the finders of fact did not do so. Cabana v. Bullock, ___ U.S. ___, 106 S. Ct. 689, 85 L. Ed. 2d 476 (1986) allows an appellate to supply the requisite Eighth Amendment findings in those rare instances where the record clearly will support them:

For example, where a defendant conceded that he committed the killing and defended against the charge of murder only by claiming self-defense, a jury verdict of guilty would necessarily satisfy Enmund even if, for some reason, the trial court's instructions did not explicitly require a finding that the defendant killed, attempted to kill, or intended to kill.
Enmund, supra, 106 S. Ct. at 700, n. 6

A majority of the members of this Court recently held that Jackson v. State, ___ So. 2d ___ (Fla. 1986) (Case no. 66,671, slip op. filed Dec. 24, 1986) was one such case, and made the Enmund findings based on evidence in the trial transcript. Jackson sets out the procedure for trial courts to follow in

future felony-murder cases so that the requisite findings of intent will be made at the trial level. The majority states, however, that the mandated procedure is prospective; thus, a conviction is not per se invalid if the jury instructions were inadequate, so long as the appellate court has an adequate record from which it can supply the Enmund findings (citing Cabana v. Bullock, supra). Because the defendant Jackson was shown to have planned the robbery with his brother several hours in advance, and consented to his brother's holding a loaded gun on the clerk while Jackson pilfered the store, "the only reasonable conclusion...is that appellant contemplated or intended that lethal force would be used should he and his brother encounter resistance from their prey." Jackson, supra, slip op. at p. 6. Even under those facts (which included an admission of his involvement by Jackson), two members of this Court opined in dissent that the record did not permit the findings of intent required by Enmund. The dissenters reminded the majority that "the nature of the offense, by itself, is insufficient to meet the Enmund principles that a non-triggerman must have intended a killing take place or knew lethal force would be employed." Id., slip op. at p. 8.

In the State's brief, however, this Court is urged to hold that in the instant case, Enmund and Cabana v. Bullock will authorize the imposition of a death sentence only because the appellant was found to be "a major participant in an armed

robbery" who apparently fired a weapon once during the crime, and he "did nothing to dissociate himself from the robbery or the murder," Brief of Appellee, pp. 54-55. This argument is misleading in that the record is quite silent as to what may have happened among the three participants either before or after the crime, except that Ms. Braun indicated the appellant was very angry and distressed after the shooting. Unlike the record in Jackson, where the defendant admitted his intent and participation, this record contains no inkling of intent. The appellant has, in all phases of trial, maintained his innocence. The weapon which he allegedly fired was aimed at the ceiling, not at any person. Faced with such a flimsy record, and at such a distance from the live testimony, this Court cannot possibly make an appellate-level finding that would satisfy Enmund. The death penalty is, therefore, Constitutionally impermissible.

CONCLUSION

Nothing contained in the State's brief is sufficient to rebut the contentions of error pointed out by the appellant in this case. The defendant/appellant's conviction must be vacated or, at the very least, the death sentence must be set aside.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed this 14th day of February, 1987, to Susan Hugentugler, Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Fl. 332128.

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