IN THE FLORIDA SUPREME COURT

GARY L. TILLMAN, :

Appellant, :

vs. : Case No. 68,506

STATE OF FLORIDA, :

Appellee. :

:

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DOUGLAS S. CONNOR
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STATEMENT OF THE CASE

Appellant, GARY L. TILLMAN, will rely upon the Statement of the Case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his initial brief.

SUMMARY OF THE ARGUMENT

Contrary to Appellee's assertion that Tillman's sentencing before the judge was outside the scope of the plea agreement, it is clear that the agreement included restriction on the evidence to be presented to the court as well as the jury.

Although Tillman never moved to withdraw his plea of guilty in the trial court, upon violation of a plea agreement, withdrawal is the only correct remedy. Also, lack of a motion to withdraw plea does not bar this Court from considering on direct appeal whether the judge erred by accepting a guilty plea without following the correct procedure.

The trial judge's failure to personally interrogate Appellant concerning all of the consequences of his guilty plea is not only a violation of Fla.R.Cr.P. 3.172; but, in a capital case, it also amounts to a constitutional violation.

Appellee basically contends that this Court's decision in State v. Neil, 457 So.2d 481 (Fla.1984) requires only that the prosecutor give a facially sufficient reason other than race for peremptory strikes when asked to explain his peremptory strikes by the trial

judge. However, Appellant argues that the court must evaluate the explanation given by the prosecutor and reject any non-racial explanation which is not bona fide. In the case at bar, where a reason advanced for striking black prospective jurors also applied to a white juror who sat on the jury, reversible error is present.

The prosecutor's remark in closing argument that Tillman "violated the rules" in conjunction with the court's erroneous instruction that "no one of us has a right to violate the rules we all share" made Tillman's capital sentencing proceeding constitutionally invalid.

ARGUMENT

ISSUE I.

BECAUSE THE PROSECUTOR BREACHED THE WRITTEN PLEA AGREEMENT, TILLMAN'S SENTENCE OF DEATH MUST BE VACATED AND HE SHOULD BE ALLOWED TO WITHDRAW HIS GUILTY PLEA.

Appellee contends that the language of the plea agreement "proceeding conducted in accordance with Chapter 921.141(1), Florida Statutes" should be narrowly interpreted to mean only the penalty proceedings before the jury and not the sentencing hearing before the judge. Brief of Appellee, p.7-8. However, the statutes do not mention a separate sentencing proceedings before the judge. Clearly the judge has discretion in a capital case to either impose sentence immediately after receipt of the jury recommendation or to schedule a separate sentencing hearing.

If a separate sentencing hearing is scheduled, it still falls within the purview of Section 921.141(1). As this Court has made clear, due process of law applies to the capital sentencing

process before the judge as well as the penalty phase before the jury. Engle v. State, 438 So.2d 803 (Fla.1983). The plea agreement itself incorporates reference to the sentencing in subsection (p) of Paragraph 5 which otherwise sets forth the parameters of allowable evidence in the penalty proceedings before the jury. Thus, the structure of the plea agreement is consistent with an intention to view the sentencing before the judge as an integral part of Section 921.141(1), Florida Statutes.

Appellee also urges that Appellant's request on appeal that he be allowed to withdraw his plea should be denied because no motion to withdraw plea was presented to the trial court. Brief of Appellee, p.9-11. While Appellee correctly asserts that this relief was never requested in the trial court, plea withdrawal is nonetheless the only appropriate remedy for breach of a plea agreement.

In Macker v. State, 500 So.2d 256 (Fla.3d DCA 1986), the Third District recognized that Florida law permits a defendant to withdraw his plea if the state breaches the plea agreement. 500 So.2d at 259. This remedy is appropriate because the defendant's entry of a guilty plea must be voluntary. When a plea is entered in exchange for promises by the state, the voluntariness of the plea is conditioned upon fulfillment of the promises. Accordingly, failure to fulfill the promises converted Tillman's plea into an involuntary one which cannot stand.

ISSUE II.

THE COURT FAILED TO PROPERLY ADVISE TILLMAN OF THE CONSTITUTIONAL RIGHTS HE WAS WAIVING BY PLEADING GUILTY AND THE FULL CONSEQUENCES OF ACCEPTING THE PLEA BARGAIN IN VIOLATION OF THE FEDERAL CONSTITUTION, EIGHTH AND FOURTEENTH AMENDMENTS.

Appellee again contends that Appellant's failure to move to withdraw his plea of guilty in the trial court bars consideration of this issue on appeal. Brief of Appellee, p.14. However, this Court has specifically noted that an argument pertaining to the validity of a guilty plea or the propriety of the Court's action in accepting a guilty plea is cognizable on appeal. Trawick v. State, 473 So.2d 1235 (Fla.1985); Robinson v. State, 373 So.2d 898 (Fla. 1979).

Turning to the merits, Appellee contends that the trial court's inquiry of Appellant as to whether he understood the plea agreement and his representation that the agreement was discussed with his attorneys suffice to show a voluntary and intelligent entry of plea. In other words, Appellee argues that the trial judge need not personally admonish the defendant concerning the consequences of a guilty plea if the judge is satisfied that the defendant has read the written plea agreement and discussed it with counsel.

In McCarthy v. United States, 394 U.S. 459, 89 S.Ct.1166, 22 L.Ed.2d 418 (1969), the Supreme Court required a federal trial judge to personally interrogate a criminal defendant prior to accepting a guilty plea. However, the McCarthy decision rests on construction of Federal Rule of Criminal Procedure 11. The Court specifically

declined to reach any of the constitutional arguments presented. Appellant now asserts that the Eighth and Fourteenth Amendments require in a capital case that the defendant be personally interrogated by the trial court regarding the constitutional rights waived and the consequences of a guilty plea. If this Court declines to reach this constitutional argument, it should nevertheless reach the same result under Fla.R.Cr.P. 3.172.

ISSUE III.

THE TRIAL JUDGE'S STATEMENT TO THE JURY WHICH DIMINISHED THE IMPORTANCE OF THEIR ADVISORY SENTENCE DEPRIVED APPELLANT OF A RELIABLE SENTENCING DETERMINATION.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE IV.

THE TRIAL COURT DID NOT CONDUCT A PROPER INQUIRY INTO APPELLANT'S OBJECTION THAT THE STATE UTILIZED PEREMPTORY STRIKES AGAINST PROSPECTIVE JURORS SOLELY ON THE BASIS OF THEIR RACE.

At the outset, it should be recognized that the fact that one black juror (Mr. Watkins) sat on Tillman's jury (R710) does not nullify Appellant's argument. Rather, the striking of any black juror for a racial reason violates the Equal Protection Clause of the Fourteenth Amendment, even where other black jurors are seated and valid reasons shown for striking other black jurors. United States v. David, 803 F.2d 1567 (11th Cir.1986).

Appellee's main contention seems to be that this Court,

when it held that Article I, section 16 of the Florida Constitution prohibits exercise of peremptory strikes on racial grounds [State v. Neil, 457 So.2d 481 (Fla.1984)], also intended that a prosecutor's reason be accepted on its face rather that critically examined. Appellee relies upon the Fourth District's decision in Taylor v. State, 491 So.2d 1150 (Fla.4th DCA 1986). Indeed, Appellee cites language from Taylor noting that no Florida appellate court has found a reason given by a prosecutor unacceptable under Neil.[1/]

By contrast, the Third District has decided that the Neil court did not intend a mere facial showing of impartiality leaving only a hollow remedy. In Slappy v. State, 503 So.2d 350 (Fla.3d DCA 1987), the court held that the trial judge must evaluate any seemingly race-neutral explanation of a peremptory strike to determine whether it is bona fide. In particular, the Slappy court noted five factors to be considered red flags that profferred explanation may not be bona fide:

> 1) an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically
>
> 2) no examination or only a perfunctory examination of the challenged juror
>
> 3) disparate examination of the challenged juror, i.e., questioning challenged venireperson so as to evoke a certain response without asking the same question of other panel members
>
> 4) the reason given for the challenge is unrelated to the facts of the case

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1/ This comment by the Taylor court apparently overlooks the earlier decision of Hale v. State, 480 So.2d 115 (Fla.2d DCA 1985).

> 5) disparate treatment where there is no difference between responses given to the same question by challenged and unchallenged venirepersons

503 So.2d at 355

At bar, the situation is somewhat complicated by the fact that the trial judge, rather than the prosecutor, gave reasons for exercise of the peremptory strikes against blacks. Although Appellee asserts that the prosecutor was "ready, willing and able" to explain the peremptory strikes (Brief of Appellee, p.23), the record shows that the prosecutor didn't want "to parrot what the Court said." (R571) Accordingly, the reason held sufficient by the trial judge, "educational background," must be evaluated. (R570-571)

To begin with, even the trial judge recognized that the perceived intelligence or educational background criteria was not being even handedly applied in the jury selection. The judge exclaimed at one point:

> I think some good jurors have been excused. And I think you have got some real dumbos on the jury right now, if you go with the eight or nine that you have got. But, again, that is your reason as to why. (R570)

Moreover, it does not appear that the case at bar really required jurors of exceptional intellectual ability. There was no guilt or innocence issue to be decided. The two aggravating factors presented by the State were not even seriously contested by the defense. Rather the jurors needed only to hear the defense witnesses and make a judgment whether this testimony in mitigation outweighed the factors in aggravation.

One point made by the trial judge was that the three

excluded black jurors "did not seem to understand the difference between aggravating or mitigating circumstances." (R571) While it it true that none of these prospective jurors originally seemed to be familiar with the terms "aggravating" and "mitigating", it is also clear that once the meaning of these terms was explained, the prospective jurors understood their proper role. (R496-497,511-512)

Not all of the white prospective jurors were familiar with the meaning of "aggravating" and "mitigating". However, they were not necessarily excused by the prosecutor. Indeed, the prosecutor on voir dire often explained the terms to prospective jurors. See e.g. R653-654. One white prospective juror, Ms. Reilly, had difficulty in understanding the terms "aggravation" (R698) and "mitigation" (R699). She concluded, "Well, I think I follow you. I think I follow you." (R701) She eventually sat on the jury. (R710)

In State v. Gilmore, 103 N.J. 508,511 A.2d 1150 (1986), the New Jersey Supreme Court rejected exercise of peremptory strikes against black jurors on the basis of "intellectual achievement." The New Jersey court explained that the prosecutor's explanation was not genuine because high "intellectual achievement" was not reasonably relevant to deciding the case. Moreover, white prospective jurors were not held to the same standard as the black prospective jurors.

The same situation is present at bar. Using the factors identified in Slappy, supra, factors 1, 4 and 5 appear to be implicated. Accordingly, this Court should reject the reason given for excusal of the black prospective jurors.

ISSUE V.

THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT "NO ONE OF US HAS A RIGHT TO VIOLATE THE RULES WE ALL SHARE" DENIED TILLMAN HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION.

At one point in his closing argument to the jury, the prosecutor stated in reference to Tillman:

> He violated the rules which we as a society must follow to preserve ourself. (R926)

Before submitting the case to the jury, the judge instructed them:

> No one of us has a right to violate the rules we all share. (R948)

The close association between the prosecutor's remark and the court's instruction creates a reasonable possibility that a reasonable juror could have heard the court's instruction as an echo of the prosecutor's argument. Such a juror might well conclude that the trial judge was endorsing the prosecutor's position that death was the proper sentence. The Eighth and Fourteenth Amendments to the U.S. Constitution cannot permit such error in a capital sentencing proceeding.

As to Appellee's contention that the error was not preserved for appellate review, it is enough to note that Appellant made a contemporaneous objection and followed up with a request for curative instruction or mistrial. (R949) Certainly, the trial court was given an opportunity to alleviate the prejudice caused by the erroneous instruction.

ISSUE VI.

THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTOR TO PLANT MISLEADING AND IRRELEVANT CONSIDERATIONS BEFORE THE JURY ON CROSS-EXAMINATION OF DEFENSE WITNESSES.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE VII.

THE WRITTEN SENTENCING ORDER SHOWS THAT THE COURT GAVE INADEQUATE CONSIDERATION TO THE MITIGATING EVIDENCE AND THAT AN AGGRAVATING CIRCUMSTANCE BARRED BY THE PLEA AGREEMENT ENTERED INTO THE WEIGHING PROCESS.

Appellant will rely upon his argument as presented in his initial brief.

CONCLUSION

Appellant will rely upon the conclusion as presented 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 27th day of May, 1987.

DOUGLAS S. CONNOR