IN THE SUPREME COURT OF FLORIDA

GREGORY SCOTT ENGLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO.: 68,548

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case found in Appellant's brief. Appellee adopts the Statement of the Facts found in the opinion of this Court (Engle v. State, 438 So.2d 803 (1983)). The facts as stated therein amply support the verdict of the jury finding Appellant guilty of murder in the first degree, and there is no claim to the contrary by Appellant.

As to the resentencing, Appellant's summary of the testimony is reasonably accurate.

In sentencing Appellant to death, the trial judge found that the evidence at trial conclusively established that Appellant was an active participant in all phases of the crime and at least contemplated that lethal force be used (R 206). The court found no mitigating circumstances, and the following aggravating circumstances:

> A. THE FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE COMMISSION OF, OR IN ATTEMPTING TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, A ROBBERY, SEXUAL BATTERY, ARSON, BURGLARY, KIDNAPPING, OR AIRCRAFT PIRACY OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.
>
> Engle's roommate testified that Engle had been gone all night. The defendant made certain incriminating statements to Nathan Hamilton concerning blood on his knife, and further statements that it had not been worth killing a girl for $50 or $60 dollars.
>
> Other evidence establishing this aggravating circumstance includes: 1) the victim's blood was found on the trunk latch in the car used

in the abduction, 2) semen was found on the backseat of the car used in her abduction, and 3) testimony from the medical examiner establishing that the victim had been the subject of a violent battery.

The only conclusion a reasonable person could draw from the evidence taken in its totality is that Kathy Tolin, a young, petite, mother of two, was robbed, kidnapped, brutally raped, and mutilated, before being violently murdered.

B. THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PRESENTING A LAWFUL ARREST OR AFFECTING AN ESCAPE FROM CUSTODY.

The evidence presented at trial conclusively established that Gregory Engle and Rufus Stevens murdered Kathy Tolin to prevent their apprehension. Both Engle and Stevens lived in the neighborhood in which the convenience store was located and both were known to the victim. Additionally, the defendant made statements to a witness concerning Stevens' fear that the victim would identify both he and Stevens.

The only reasonable inference that can be drawn from the evidence is that Kathy Tolin was murdered so that her killers would not be apprehended.

C. THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

Evidence proved beyond any doubt that the murder of Kathy Tolin was the conclusion of a criminal episode that began in the scheme of Engle and Stevens to rob the convenience store.

D. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Testimony established that a large object had been inserted into the victim's vagina causing a severe laceration. After being assaulted, she was brutally murdered. Testimony revealed that the victim was first

> strangled with a ligature and while she was still alive an unsuccessful attempt was made to stab her in the back with a broken knife later found to belong to Rufus Stevens. The knife belonging to Gregory Engle was used to repeatedly stab her in the back, penetrating her lungs.
>
> The evidence established beyond any doubt that Kathy Tolin's murderers by their acts, cruelly inflicted unbelievable terror, wickedness and cruelty, all of which were designed to inflict a high degree of pain with utter indifference to the suffering of Kathy Tolin.

(R 206-208).

In this Court's opinion, reviewing Appellant's first death sentence, this Court found that the trial judge's findings were valid, except for those findings based on Steven's confessions/ admissions emanating from the separate trial of Stevens.

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, as well as the nonstatutory mitigating evidence not presented to the jury, and concluded that each of the aggravating factors outweighed the nonexistent mitigating factors. This Court cannot speculate as to whether there was any reasonable basis for the jury to recommend life when there was no evidence of any such reasonable basis, to-wit: four aggravating and no mitigating circumstances.

Further, there was sufficient evidence to support the trial court's imposition of death as Appellant was an active participant in the crime, having been present at all stages of the crime, Appellant at least contemplated the use of lethal force, as he was present and his knife was used.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN REJECTING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, THEREBY IMPOSING A SENTENCE OF DEATH.

The jury's advisory sentence, pursuant to § 921.141(2), Fla. Stat., was life imprisonment. The trial court, on resentencing pursuant to this Court's opinion, "reassessed all aggravating and mitigating circumstances without taking into consideration inadmissible statements made by Rufus Stevens." (R 206). The court also "thoroughly studied the record" and considered all arguments by counsel. (R 206). In resentencing Appellant to death, the court carefully considered all the statutory aggravating circumstances and non-statutory mitigating circumstances, and again found four aggravating circumstances and no mitigating circumstances. (R 206-208).

Appellant now contends the trial court erred in overriding the jury's recommendation of life, because there was a reasonable basis for the jury's life recommendation. 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. This Court in Engle 1 recognized that

principle of law, and then found:

> The trial judge found four aggravating circumstances, to-wit: that the murder was committed after appellant had engaged in a kidnapping and rape, that it was committed for pecuniary gain, and that it was especially heinous, atrocious and cruel. He found no mitigating circumstances. Review of the record demonstrates the validity and propriety of the above findings. [Emphasis supplied.]

(438 So.2d at 812). Since this Court has already reviewed the record and found that the record demonstrates the validity of the court's findings as to the override (except for consideration of the inadmissible evidence), the court's findings in the resentencing order are due the same treatment. This Court did not find that the trial judge's findings with respect to aggravation and mitigation were erroneous.

In this resentencing appeal, there is no issue concerning the jury's recommendation of life. At the resentencing hearing the jury was not involved; there was no new evidence or testimony presented to the jury. Thus, there is no possible way for this court to now speculate as to what the jury might have recommended had the jury heard any of the evidence which was presented at the resentencing hearing and which could have been presented in mitigation before the jury the first time around but was not so presented.

Section 921.141(2) Florida Statutes 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 the 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 its findings upon which the sentence of death is based as to the facts . . . . [Emphasis supplied.]

This Court has consistently and repeatedly noted that in Florida 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, 283 So.2d 1 (Fla. 1973); Lamadline v. State, 303 So.2d 17 (Fla. 1974). The ultimate decision as to whether the death sentence should be imposed rests with the trial judge. Thomas, supra; Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. den., 439 U.S. 920 (1978).

Pursuant to the statute governing capital sentencing proceedings, and pursuant to prevailing case law, the trial judge may appropriately weigh aggravating and mitigating circumstances regardless of what the jury's recommended sentence has been. Here, the trial court, in its role as the ultimate sentencer considered all the evidence that was before the jury, as well as the nonstatutory mitigating evidence not presented to the jury, and concluded that each of the aggravating factors outweighed the nonexistent mitigating factors. Appellant is asking this Court to require trial judges to speculate as to whether there

was any reasonable basis for a jury to recommend life when there are four aggravating circumstances and no mitigating circumstances. This Court cannot speculate as to whether there was any reasonable basis for the jury's recommendation of life--indeed, for this Court to speculatively flyspeck the record in search of any possible circumstance which could possibly have supported the recommendation of life completely obfuscates the statutory function of the sentencing judge. Tedder cannot reasonably be construed as creating a carte blanche 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. This Court is not a legislative body and should not engage in "judicial legislation" by judicially abolishing the statutory jury override found in § 941.141 Fla. Stat.; such action would clearly be contrary to legislative intent and would reduce the trial judge's sentencing function to that of merely explaining why he/she concurs with a jury recommendation. 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 (1972).

Appellant asks this Court to speculate[1] 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 enumerate its findings. To satisfy the constitutional standards espoused in Furman v. Georgia, and Profitt v. Florida, 428 U.S. 242 (1972), 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 four aggravating factors and no mitigating factors, and his findings are not erroneous, this Court must agree that death is the appropriate sentence. Cf. Wainwright v. Goode, 464 U.S. 78 (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 facts justifying Appellant's death sentence are so clear and convincing that reasonable persons could not differ as to the appropriate sentence. The evidence presented at trial

[1]For instance, Appellant in his brief states that "The jury could reasonably have concluded from the evidence that Stevens was the leader and appellant the follower; that Stevens planned the robbery and abduction, and enlisted appellant's aid without even telling him about the latter part of the plan; that Stevens was the one who expressed concern about being identified, and who 'went crazy' once they got the victim out of the store." Appellant's initial brief, p.36. Appellant continues on in speculating about what the jury could have believed, throughout the brief.

conclusively established that Appellant and Rufus Stevens "robbed, abducted, raped, mutilated, and then murdered" Kathy Tolin. Appellant was an active participant in all phases of this crime and Appellant contemplated that lethal force be used. The trial judge explicitly listed the facts supporting his findings as to each aggravating factor. 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.

ISSUE II

IMPOSITION OF THE DEATH PENALTY UPON APPELLANT IS NOT CONSTITUTIONALLY PROHIBITED UNDER THE PRINCIPLES OF ENMUND V. FLORIDA.

Appellant contends there was an absence of evidence to support the trial judge's findings that Appellant was an "active participant in all phases of the crime" and that he "at least contemplated that lethal force be used," citing to Enmund v. Florida, 458 U.S. 782 (1982). In Enmund the Supreme Court held that Florida's death penalty statute cannot be applied to one who did not kill, attempt to kill, intend to kill, or intend that lethal force be used. Here, as in Hall v. State, 420 So.2d 874 (Fla. 1982), Appellant provided the weapon used to kill the victim and was present at her death. Appellant was involved in the entire sequence of events, ending in the murder of the victim. There is no doubt that Appellant at least contemplated that lethal force be used. See Ruffin v. State, 420 So.2d 591 (Fla. 1982); and Brown v. State, 473 So.2d 1260 (Fla. 1985).

CONCLUSION

For the reasons set forth above, the sentence of death should be upheld.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was hand delivered to Steven L. Bolotin, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 3rd day of September, 1986.

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