IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,919

JESUS SCULL,

Appellant,

JUL

CLERK,

By

Deputy Clerk

-vs-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISCHARGE COUNSEL WHERE IT FAILED TO CONDUCT AN ADEQUATE INQUIRY AND THERE WAS A RISK OF CONFLICTING INTERESTS, IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In response to this claim, the state relies on a legally irrelevant argument made in a factual vacuum. The state emphasizes defendant Scull's "glowing" remarks about his trial counsel (Brief of Appellee at 7, 10) but ignores the context in which they were made. Scull had just been convicted, and his trial counsel had again informed the court that he had done

nothing to prepare for the penalty phase. (T.1259-60).[1] Counsel reminded the court that Scull had moved to dismiss him two or three times, and he noted Scull's lack of cooperation. (T.1260). Scull's "glowing terms" were uttered after his counsel threatened to withdraw from his case at its most critical point. (T.1266). Under these circumstances, Scull's expressions of satisfaction with his trial counsel and retreat from his original position are irrelevant. United States v. Cronic, 466 U.S. 648, 657 n.21, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); United States v. Ellison, 798 F.2d 1102, 1107-08 (7th Cir. 1986).

The state's myopic emphasis on Scull's subjective utterances (Brief of Appellee at 8, 10) ignores the objectivity of the record. In counsel's letter to Scull, he addressed his client's concerns regarding the delays in his case. (S.). Counsel told Scull that the delays were not caused by defense counsel but by docketing problems and the prosecutor's trial schedule. (S.).[2] The record, however, reflects that counsel filed at least one motion for continuance and that he expressly agreed to each of the state's motions for continuance. (R.5, 38, 130-32, 133-34, 135). The record also reflects that in the one-year period between counsel's appointment and the hearing on Scull's motion

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1. In this brief, the symbol "R." refers to the record on appeal, the symbol "T." refers to the transcripts, the symbol "S." refers to the supplemental letter from trial counsel to his client, and the symbol "SR." refers to the supplemental advisory sentences. All emphasis is in the original.

2. Counsel's letter may have misled Scull by implying that he could have another attorney appointed to represent him if he moved for one. (S.).

to discharge, counsel had not filed a single substantive motion. Thus, Scull's concerns about his counsel, trial delays, and the denials of motions (S.; T.311; Brief of Appellee at 9) were valid and constituted sufficient good cause for a thorough inquiry by the trial court. This is especially so in light of the seriousness of the charges, counsel's failure to appeal at the hearing, and the absence of any suggestion that Scull himself was responsible for the delays. See Brown v. Graven, 424 F.2d 1166 at 1169 (9th Cir. 1970); compare Thomas v. Wainwright, 767 F.2d 738, 742-43 (11th Cir. 1985) (defendant's intractable silence is not sufficient cause for substitution of counsel and was a sufficient waiver of any change in counsel to which that defendant may otherwise have been entitled).

The state also ignores the record of the penalty phase proceeding. Counsel's action in informing the court that Scull had failed a polygraph examination (T.1343-45) was, at the very least, a breach of his duty of loyalty to his client, see United States v. Ellison, supra at 1107, and objective verification that Jesus Scull's right to conflict-free representation was not protected by the trial court. See Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). Scull's judgment of conviction and sentence must be reversed.

II

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISCHARGE SENTENCING JURY AND IN REPLACING THE DISQUALIFIED JUROR WITH AN ALTERNATE WHERE (1) THE MISCONDUCT INVOLVED UNAUTHORIZED CONTACT BETWEEN THE FOREMAN AND THE VICTIMS' FAMILY, (2) THE STATE FAILED TO DEMONSTRATE THAT THE CONDUCT WAS NOT PREJUDICIAL, AND (3) THE COURT FAILED TO FOLLOW PROCEDURAL SAFEGUARDS.

The state's summary answer to this claim is that a juror perhaps disobeyed a court order and that the other jurors said they had not been influenced by that one juror's "misbehavior." (Brief of Appellee at 7). In view of the fact that, as the trial court found, the foreman of the jury had unauthorized contact with family members of the victims (T.1290, 1298), it is not surprising that the state "can see no error in these proceedings." (Brief of Appellee at 13).[3] It is not surprising because the state ignores the factual and legal underpinnings of this claim.

First, there was a six-week delay between the discovery of the misconduct and the questioning of court personnel and family members (T.1284, 1288-94) and the individual voir dire of the jurors. (T.1295-1339). The misconduct occurred immediately after the trial court admonished the jurors (T.1281) as it had on numerous occasions (T.607-08, 629-31, 703-04, 924, 107-74, 1112) not to discuss the case or to have contact with anyone involved

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3. These same family members provided victim impact statements which are contained in the presentence investigation report considered by the trial court. (T.1384). See Appellant's Motion to Supplement Brief filed simultaneously herewith.

in the case. Indeed, the jurors were told at the outset to report any attempts at contact to the bailiff. (T.631).

This was, therefore, one of those situations recognized by the Court as "carry[ing] such an inherent danger of improper influence that courts should remedy the error without requiring the accused to show that any such improper influences actually operated upon or affected the jury." Livingston v. State, 458 So.2d 235, 238 (Fla. 1984); see also Raines v. State, 65 So.2d 558, 559-60 (Fla. 1953); Armstrong v. State, 426 So.2d 1173 (Fla. 5th DCA 1983).

Second, at the beginning of the penalty phase, the trial court made it clear that despite the unauthorized contact, it intended to go through with the capital sentencing hearing:

* * *

> This Court has had a great deal of time to think and research this, and this Court is of the opinion that we must go forward. This Court is of the opinion that to stop at this point would give a message to anyone who wish[es] to test the will of this Court, that I could never get to the death penalty phase of any case.
>
> Well, the word will be sewn [sic] and sounded to this community that this judge will complete both phases of a trial.

* * *

(T.1298-99).

The individualized voir dire of the jurors which followed must be analyzed in light of the trial court's statements.

> Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court

> to preserve the right to jury trial for an accused Mr. Justice Sutherland said that such duty 'is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.'

Glasser v. United States, 315 U.S. 60, 71, 62 S.Ct. 457, 86 L.Ed. 680 (1942), quoting Patton v. United States, 281 U.S. 276, 312, 50 So.Ct. 253, 74 L.Ed. 854 (1930).

An examination of the voir dire reveals that the court presiding over this capital case did not conduct the hearing on the defendant's motion to discharge the sentencing jury with the requisite "solicitude for the essential rights of the accused."

Third, it is significant that not one of the jurors who was aware of the misconduct saw fit to report it to the trial court. In Government of the Virgin Islands v. Dowling, 814 F.2d 134 (3d Cir. 1987), the court considered the effect of a note from an alternate juror indicating that the jury had been exposed to extra-record information. The alternate replaced the juror who had told the others of the forbidden information. The court noted:

> The defense's acceptance of Delgado [the alternate] as a juror does not undercut its contention that meaningful inquiry into the possibility of juror taint was required. Delgado's reaction to Richardson's [the disqualified juror] comments forcefully demonstrated her personal commitment to a fair trial for the defendant and provided assurance that her assertion of impartiality could be credited. By contrast, the other jurors did not report Richardson's

> revelations to the judge despite the fact that they knew they were not supposed to be exposed to extra-record information, and the judge's failure to meaningfully inquire into their state of mind deprived counsel and the court of any basis for evaluating their implicit protestations of impartiality.

814 F.2d at 136 & n.1. The court reversed Dowling's conviction because the trial judge did not solicit sufficient information from the remaining jurors to make a responsible determination of impartiality. Id. at 137.

Similarly, in this case, the trial court failed to conduct a probing inquiry. When confronted with the varying and contradictory responses of the participants in the misconduct, as well as those who observed or heard about it, the trial court merely asked whether the incident would affect their ability to make a recommendation of sentence (T.1304, 1313-14, 1318, 1321, 1322, 1329-30), or to be fair and impartial (T.1326-27, 1328, 1329), or to finish the case. (T.1332). This superficial inquiry and the juror's protestations of impartiality which it elicited were inadequate as a matter of law. See United States v. Heller, 785 F.2d 1524, 1527-28 (11th Cir. 1986).[4]

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[4]. It should be noted that more is at stake here than the denial of the defendant's Sixth Amendment right to a fair and impartial jury. The misconduct of the jury raises independent Eighth and Fourteenth Amendment issues. "Due process means a jury capable and willing to decide the case solely on the evidence before it....", Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 946 (1982), and jury verdicts "should be set aside where it is shown that the impartiality of jurors may have been affected or where tainted material has come before the jury." Farese v. United States, 428 F.2d 178, 180 (5th Cir. 1970); accord United States v. Vazquez, 597 F.2d 192, 193-94 (9th Cir. 1979).

(Footnote continued on next page)

Reversal is required for an additional reason. Two of the jurors gave equivocal responses as to their ability to be fair and impartial:

* * *

> [The Court]: And have you lived up to the Court's instruction, do not form any definite or fixed opinion, don't discuss the case because you got to come back and finish phase two?
>
> [Juror Sanchez]: Definitely, sir.
>
> Q. So whatever - -
>
> A. It is kind of hard.
>
> Q. So whatever happened doesn't affect your ability to continue with this case?
>
> A. No.

* * *

(T.1318).

* * *

> [Defense counsel]: And there is nothing about that [unauthorized contact] that makes you feel that you now have an impartial feeling about this case?
>
> [Juror Villalobos]: Not really.

(Footnote continued from previous page)

Eighth Amendment protections are also invoked by Scull's claim of jury misconduct. The Supreme Court long ago noted that "[i]t is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." Mattox v. United States, 146 U.S. 140, 149, 13 S.Ct. 50, 36 L.Ed. 917 (1894). The Eighth Amendment required a greater degree of reliability in capital cases than is required in other criminal proceedings, see, e.g., Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), and further mandates that sentencing discretion in capital cases be "channelled so that arbitrary and capricious results are avoided." Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049, 2052, 72 L.Ed. 2d 361 (1982) (citations omitted).

Q. Not really?

A. Not me.

* * *

(T.1324).

The statements of these jurors evince a reasonable doubt as to their ability to be impartial in the penalty phase of trial. The trial court erred in refusing to discharge them. Robinson v. State, 12 F.L.W. 985 (Fla. 5th DCA April 17, 1987).

Finally, the trial court failed to follow procedural safeguards to obviate the danger of unfair prejudice created when the alternate juror replaced the disqualified foreman. Ensuring that the remaining jurors would be able to deliberate anew, as mandated by the Eleventh Circuit in United States v. Phillips, 664 F.2d 971 (11th Cir. 1981) and United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982) was essential in this case. The state did not present any evidence at sentencing; to establish aggravating circumstances, it relied on the evidence adduced at trial and the convictions. Contrary to the state's assertion (Brief of Appellee at 13), the remaining jurors had begun their deliberations. Defendant Jesus Scull must receive a new trial.

III

THE APPLICATION OF FLORIDA'S CAPITAL SENTENCING STATUTE TO JESUS SCULL UNDER THE FACTS OF THIS CASE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The state's cross appeal is without merit. "Finding or not finding the existence of mitigating factors is within the trial

court's domain, and such findings will not be reversed because an appell[ee] views them in a different light." Hansbrough v. State, 12 F.L.W. 305 (Fla. June 18, 1987). The trial court was in a position to observe Jesus Scull's physical appearance and level of emotional maturity when it found age as a mitigating circumstance.

Defendant Scull had no significant history of prior criminal activity. The trial court could not have found an additional aggravating circumstance based on the defendant's contemporaneous convictions because these two circumstances are mutually exclusive. Wasko v. State, 12 F.L.W. 123 (Fla. March 6, 1987). Moreover, even in the absence of mitigating factors, death is not necessarily the appropriate penalty. Nibert v. State, 12 F.L.W. 225 (Fla. May 7, 1987). Death certainly was not a valid sentence in this case. It is the state which plainly errs here. (Brief of Appellee at 18).

The trial court improperly found several aggravating circumstances and expressly used arbitrary and irrelevant nonstatutory aggravating circumstances - - lack of remorse and insistence on innocence (T.1389-90) - - in satisfying itself that the aggravating factors outweigh the mitigating factors.

The state concedes that the record does not support the findings of heinous, atrocious, or cruel and pecuniary gain as applied to the murder of Miriam Mejides. (Brief of Appellee at 26). The remainder of the state's argument is based on a theory that finds no support in the record. Cocaine transactions and

guns (Brief of Appellee at 23-26) have nothing to do with this case. Moreover, the state's attempt to distinguish Peek v. State, 395 So.2d 492 (Fla. 1981) on the basis that "appellant in this case was looking for property, not sex" (Brief of Appellee at 20) ignores the positioning of the bodies and the presence of a rubber phallus.

Recently, this Court emphatically reaffirmed its holding in Preston v. State, 444 So.2d 939, 946-47 (Fla. 1984) that the aggravating circumstance of cold, calculated, and premeditated is found only where the facts show a "particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." Nibert v. State, supra, 12 F.L.W. at 226. The facts, here, do not qualify.

The trial court committed numerous sentencing errors in this case. The consistent recognition of death as a special punishment has led courts to scrutinize carefully the procedures under which it is imposed. Jesus Scull's sentences of death offend the Eighth Amendment. They must be reversed.

CONCLUSION

For the reasons given and upon the authorities cited, the appellant requests this Court to reverse the judgment and sentence of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the office of the Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, on this 9th day of July, 1987.

BY: Robin H. Greene
ROBIN H. GREENE