

IN THE SUPREME COURT OF FLORIDA

JUAN BANDA, :
Appellant, :
vs. :
STATE OF FLORIDA, :
Appellee. :
_____ :

SEP 10 1957
COURT

Case No. 69,102

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Appellant, Juan Banda, 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 ARGUMENT

Under the circumstances presented at bar, failure to instruct the jury on an essential element of premeditated murder was fundamental error. A decision of this Court cited by Appellee in his brief must be distinguished because Banda did not admit the element was proved. Other federal decisions and prior dicta of this Court direct that the complete failure to instruct the jury on the lawful homicides of justifiable and excusable homicide amounts to fundamental error.

Because an essential step in the jury's penalty deliberations is deciding whether "sufficient aggravating circumstances exist", the trial court's preclusion of defense argument directed towards diminishing the importance of the one aggravating factor presented by the State was error of constitutional dimension.

A recent decision of this Court explaining the scope of the cold, calculated and premeditated aggravating circumstance

should be compared to the facts at bar. In Williamson v. State, Case No. 68,800 (Fla. July 16, 1987) there was no evidence of any threatening behavior on the part of the victim prior to the homicide. By contrast, at bar the victim had threatened Appellant. Accordingly, the cold, calculated and premeditated aggravating circumstance was erroneously found.

ARGUMENTS

ISSUE I.

THE TRIAL COURT'S FAILURE TO GIVE ANY JURY INSTRUCTION ON JUSTIFIABLE OR EXCUSABLE HOMICIDE DENIED BANDA DUE PROCESS OF LAW AND DEPRIVED HIM OF HIS RIGHT TO HAVE A JURY DETERMINE HIS GUILT OR INNOCENCE REGARDING EVERY ELEMENT OF THE CRIME HE WAS ACCUSED OF COMMITTING.

Appellee's brief does not contest Appellant's assertion that an "unlawful killing" is an essential element of premeditated murder under the Florida statutory scheme. Therefore, it is surprising that Appellee relies upon the fact that at trial, Banda "did not defend on the basis that he had killed but that the killing was either justifiable or excusable." Brief of Appellee, p.9. Clearly in Appellee's view, justifiable or excusable homicide must be raised as an affirmative defense in order to merit instruction. This is directly contrary to the legislative intent expressed in Section 782.04, Florida Statutes (1985) which clearly places the burden upon the State to prove that the killing was not one of the lawful homicides. The accused need not elect between denying the homicidal act and asserting a justifiable or excusable killing; he can force the State to prove both that he did the killing and that it was an unlawful killing.

Appellee cites this Court's decision in Stewart v. State, 420 So.2d 862 (Fla. 1982) for the proposition that failure to instruct the jury on a requisite element of a crime is not necessarily fundamental error. Two factors distinguish Stewart

from the case at bar. First, Stewart took the stand and admitted intent to deprive the victim of her property (the element of robbery upon which the jury was not instructed). Banda did not take the stand at bar. Second, the lack of instruction in Stewart concerned only a non-capital felony in contrast to the capital felony for which Banda was convicted. A higher standard of due process is applicable where a sentence of death may be imposed. See e.g., Beck v. Alabama, 447 U.S. 625 (1980).

The United States Supreme Court in Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986) summarized its past holdings regarding jury instruction on essential elements of a criminal offense as follows:

A defendant charged with a serious crime has the right to have a jury determine his guilt or innocence, Duncan v. Louisiana, 391 US 145 (1968), and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, Sandstrom v. Montana, 442 US 510 (1979). Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime. See Connecticut v. Johnson, 460 US 73, 95, and n.3 (1983) (Powell, J., dissenting); cf. Beck v. Alabama, 447 US 625, 645 (1980); Presnell v. Georgia, 439 US 14 (1978); *id.*, at 22 (Powell, J., dissenting).

88 L.Ed.2d at 715.

Recently, in Cole v. Young, 817 F.2d 412 (7th Cir. 1987), the court held that complete failure to instruct the jury on an essential element of the charged offense where the jury was not otherwise informed of the necessity for proof of the element violated

the Due Process Clause of the Fourteenth Amendment. Notably, there was no objection made in the state trial court to the court's failure to instruct on an essential element of the offense. The Cole court's analysis focused upon the United States Supreme Court's decision in Sandstrom v. Montana, 442 U.S. 510 (1979) where it was held that a jury instruction which could have been interpreted to establish a conclusive presumption on one element of the crime violated due process because it conflicted with the presumption of innocence and invaded the fact-finding province of the jury. Reasoning that an instruction which totally omits an element of the offense must also be invalid, the Cole court wrote:

In the case of a conclusive presumption, a jury may at least ignore the instruction or rest its verdict on trial evidence rather than the presumption. But when the jury is never told that the element forms a necessary part of the crime, the matter is taken out of its hands entirely.

817 F.2d at 425.

Although Appellee's brief does not refer to it, the decision of this Court which most directly supports his argument is that of Squires v. State, 450 So.2d 208 (Fla. 1984). In Squires, defense counsel and the prosecutor stipulated to an abbreviated form of jury instructions. On appeal, this Court held that lack of objection precluded review of the jury instructions absent fundamental error.

The facts in Squires however, are distinguishable from the facts at bar. The jury in Squires received a rudimentary

instruction which at least informed them that some homicides were lawful. The jury at bar, on the other hand, had no instruction whatsoever that homicides could be lawful.

In fact, this Court has already recognized the necessity for jury instruction on lawful homicides in murder prosecution. In Henry v. State, 359 So.2d 865 (Fla. 1978), this Court wrote:

Petitioner's argument that the jury's understanding of any "unlawful killing" must necessarily depend on its comprehension of "lawful killings" is persuasive. It is obvious that before the defendant can be convicted of any unlawful killing, the jury must conclude that the homicide was not lawfu.

359 So.2d at 868.

Because Banda's jury was never given the opportunity to decide whether the homicide was lawful or unlawful, Banda was denied due process of law under the Fourteenth Amendment, United States Constitution and Article I, section 9, Florida Constitution. The same error violated Banda's right under the Sixth Amendment, United States Constitution and Article I, section 16, Florida Constitution to have his guilt or innocence determined by a jury.

ISSUE II.

THE TRIAL COURT ERRED BY FINDING THAT THE STATE'S VIOLATION OF FLA. R. CRIM.P. 3.220(f) DID NOT PREJUDICE BANDA'S DEFENSE AND IN FAILING TO GRANT ANY MOTION FOR CONTINUANCE.

ISSUE III.

THE TRIAL COURT UNDULY RESTRICTED BANDA'S CROSS-EXAMINATION OF STATE WITNESS, ALLEN JONES.

ISSUE IV.

THE TRIAL COURT ERRED BY FAILING TO GRANT BANDA'S MOTION TO SEQUESTER THE JURY BETWEEN THE RENDITION OF VERDICT IN THE GUILT OR INNOCENCE PHASE AND THE COMMENCEMENT OF THE PENALTY PHASE.

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

ISSUE V.

THE TRIAL COURT ERRED BY NOT PERMITTING BANDA'S COUNSEL TO ARGUE DURING PENALTY PHASE ARGUMENTS A RELEVANT BASIS FOR THE JURY TO RECOMMEND A SENTENCE OF LIFE.

Section 921.141, Florida Statutes (1985) sets forth the scope of the proceedings to be followed in capital sentencing. The role of the jury in these proceedings is delineated as follows by the statute:

(2) ADVISORY SENTENCE BY THE JURY.-- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
- (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
- (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

In the statutory scheme, the jury's first consideration is "(a) Whether sufficient aggravating circumstances exist...." The final consideration, "whether the defendant should be sentenced to life imprisonment or death" is to be "based" in part on the jury's finding under paragraph (a).

Appellee contends in his brief that the court did not err by precluding defense counsel from arguing to the jury the non-existence of statutory aggravating circumstances which the State had waived. Appellee points out that defense counsel was able to mention that there were nine possible aggravating factors of which only one was being offered by the State. Appellee claims that the court's ruling did not prejudice Banda.

However, as the statute clearly reads, the jury must determine "whether sufficient aggravating circumstances exist". (e.s.). This finding depends not only on whether the facts support one statutory aggravating factor but also on whether this aggravating factor is "sufficient".

In the content of this determination, giving the jury a perspective upon the factors which the legislature declared applicable in capital sentencing is definitely relevant. Comparison with other aggravating factors not present in the case before

them gives the jury a basis for deciding whether the sole aggravating factor argued to them is "sufficient" to require it to be offset by mitigating evidence. Moreover, the argument which the trial court prevented defense counsel from making clearly relates to the weight which the jury might give one aggravating factor in determining whether to recommend a sentence of death or life.

In Lewis v. State, 398 So.2d 432 (Fla. 1981), this Court wrote that the sentencing jury:

is allowed to draw on any considerations reasonably relevant to the question of mitigation of punishment.

398 So.2d 439.

While the case at bar can be finely distinguished from cases where the sentencer was precluded from considering evidence offered in mitigation,^{1/} the distinction is not constitutionally persuasive. It is equally prejudicial to prevent a defendant such as Banda from attempting to diminish the weight of the evidence in aggravation as it is to prevent a defendant from bringing forward evidence in mitigation.

Since the jury death recommendation at bar was 7-5, the outcome could have been different with the slightest change in the jury's weighing process. Accordingly, Banda's sentence of death does not meet the Eighth and Fourteenth Amendment standard of reliability in capital sentencing.

^{1/} E.g., Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. ___, 95 L.Ed.2d 347 (1987).

ISSUE VI.

THE JURY INSTRUCTIONS GIVEN DURING PENALTY PHASE WERE ERRONEOUS BECAUSE: 1) DEFENSE REQUESTED INSTRUCTIONS ON THE SIGNIFICANCE OF THE JURY'S RECOMMENDATION AND REASONABLE DOUBT WERE DENIED, AND 2) THE JURY INSTRUCTIONS GIVEN INCORRECTLY REQUIRED THE JURY NOT TO RETURN A VERDICT UNTIL SEVEN WERE IN AGREEMENT.

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

ISSUE VII.

THE CAPITAL HOMICIDE FOR WHICH BANDA WAS CONVICTED WAS NOT COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Recently in Williamson v. State, Case No. 68,800 (Fla. July 16, 1987), this Court explained the "pretense of moral or legal justification" proviso of the cold, calculated and premeditated aggravating circumstance. The defendant in Williamson had "suspicions" concerning the victim which allegedly made him fearful that he or the co-defendant might be killed for not repaying a drug debt. Holding that these "suspicions" did not amount to a pretense of moral or legal justification, the Williamson court wrote:

There is no evidence of any threatening acts by [the victim] prior to the murder; nor is there any evidence that [the victim] planned to attack either [defendant].

12 FLW at 424.

By contrast, in the case at bar, the victim Terry Denmark had at least threatened to take Banda outside and beat him up (R1896). Banda may well have had good reason for believing that Denmark would kill him unless he got him first. Therefore, the reasoning in Williamson suggests that the case at bar should be distinguished and the cold, calculated and premeditated aggravating circumstance struck.

ISSUE VIII.

A SENTENCE OF DEATH IS NOT PROPORTIONAL
UNDER THE FACTS AND CIRCUMSTANCES OF THIS
CASE.

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