DMR:830

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 69,259

ROBERT JOE LONG,
a/k/a BOBBY JOE LONG,

Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

On Appeal from the Circuit Court of the Thirteenth Judicial Circuit, In and For Hillsborough County, Florida

APPELLANT'S REPLY BRIEF

ELLIS RUBIN LAW OFFICES, P.A.
265 N.E. 26th Terrace
Miami, Florida 33137
305/576-5600 (Miami)
305/524-5600 (Ft. Laud.)

BY: DAVID M. RAPPAPORT

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PRELIMINARY STATEMENT

Appellant, ROBERT JOE LONG, relies on his Initial Brief to respond to the State's Answer Brief and also replies as follows:

ARGUMENT

ISSUE I.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SET ASIDE THE PLEA AGREEMENT WHICH WAS INADVISEDLY ENTERED INTO AND WHICH PROVIDED FOR THE ADMISSION OF UNCONSTITUTIONALLY OBTAINED STATEMENTS AND EVIDENCE AT THE SENTENCING PHASE.

The State urges that the Defendant's election to re-enter the Plea on December 12, 1985 (one day after it was withdrawn) cured any misapprehensions that the Defendant may have had with regard to the nature and effect of the Plea Agreement.

Even if it can be argued that the Defendant's reiteration of the Plea on December 12, 1985 cured any mistakes or misapprehensions as to the Plea Agreement, there was still another key element under the case law that could no be satisfied: that the plea was entered under "circumstances effecting his rights."[1] Baker v. State, 408 So. 2d 686, 687 (Fla. 2d

[1] Although the December 12, 1985 hearing may have cured the Defendant's misapprehension with regard to the waiver of any right to appeal the issue involving the confession, there was no inquiry by the Court which would show that the Defendant understood that he was waiving the right to contest the admissibility of the confession and knife at the Sentencing Phase.

D.C.A. 1982); Yesnes v. State, 440 So. 2d 628 (Fla. 1st D.C.A. 1983).

On July 8, 1986 new counsel for the Appellant moved to set aside the Plea Agreement based upon circumstances directly effecting the Defendant's rights, i.e. that the Plea Agreement provided for a waiver of the right to contest the admissibility of unconstitutionally obtained statements and evidence. More specifically, the Plea Agreement was in direct violation of the United States Constitution as interpreted by Miranda v. Arizona, 384 U.S. 436 (1966) and its progeny, See also, Wong Sun v. United States, 371 U.S. 471 (1963).

The Plea Agreement also directly effected the Appellant's right to a fair trial as provided by F.S. §921.141 which provides, "However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida."

The State also asserts that, "Appellant's contention that the Plea Agreement was entered into inadvisedly is unsupported by this Record on Appeal and is an improper attempt to raise on direct appeal a claim of ineffective assistance of counsel." (Answer Brief pg. 10-11). Both assertions by the State, however, are without merit.

As Mr. O'Connor, Assistant Public Defender, stated on December 11, 1985 in support of his Motion to Withdraw as Counsel:

> As the Court has heard in testimony before, obviously, he has lost faith in my ability to

> effectively represent him because he attributes to me and perceives in me one of the reasons that Dr. Morrison is not available to take up the cause in his behalf.
>
> He has also indicated to the Court that he feels that I either rushed him or coerced him or in some manner, species, or form caused him to enter into a written agreement with the Court in which he give up substantial rights and entered a plea of guilty. The Court heard him say I was inattentive in spending time with him. I was less than thorough and conclusive in presenting the facts and circumstances of the written plea agreement. And that he felt that I had rushed him into making a major decision.
>
> That coupled with the absence of Dr. Morrison at this proceeding, I would submit, he has materially in his mind undermined and skuttled any kind of report [rapport] that is an absolute must in a matter of this importance. And I would respectfully urge the Court to allow me to withdraw as counsel for Robert Joe Long and for the Court to appoint independent private counsel of sufficient experience, bearing in mind the nature of these allegations. (R 1621-1622)

Thus, not only does the Record support a claim that the plea was entered into inadvisedly, but proves that the Trial Court was on notice that the Plea Agreement may have been entered into inadvisedly. Therefore, the Trial Court should not only have granted the Motion To Withdraw as Counsel but refused to accept the Defendant's re-entry of the guilty plea the following day under these allegations.

The State has also misinterpretted the Appellant's contention that the Plea Agreement was entered into inadvisedly as an improper attempt to raise on direct appeal a claim of ineffective assistance of counsel.

As stated in Harper v. Wainwright, 334 F. Supp. 1338

(M.D. Fla. 1971), "Florida Courts have consistently held that the law favors the withdrawal of a guilty plea given unadvisedly where good cause is shown." Keesee v. State, 204 So. 2d. 925 (Fla. 4th D.C.A. 1967); Banks v. State, 136 So. 2d. 25 (Fla. 1st D.C.A. 1962); Pope v. State, 56 Fla. 81, 47 So. 487 (1908).

Therefore, the inadviseability aspect of the Plea Agreement is being properly raised on direct appeal to attack the Plea Agreement, and not as an attempt for post conviction relief based upon ineffective assistance of counsel.

ISSUE II.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ADMITTING THE APPELLANT'S CONFESSION AND THE KNIFE FOUND PURSUANT TO THE CONFESSION WHERE APPELLANT EXPRESSLY WAIVED HIS RIGHT TO CHALLENGE THE ADMISSIBILITY OF THE KNIFE AND CONFESSION IN THE PLEA AGREEMENT.

The State asserts that Appellant's challenge to the admissibility of the confession and knife is improper and cannot be reviewed by this Court since the Defendant expressly waived his right to contest such admissiblity in the Plea Agreement. However, since the Plea Agreement is void and should be set aside (for the reasons asserted in Issue I), the statements and knife were thus inadmissible since they were unconstitutionally obtained.

The State also asserts that the Appellant improperly seeks review of the "admissibility of the confession and knife, not on the Record on Appeal in this case, but upon the basis of

references to Appellant's Brief in Long v. State, Florida Suppreme Court Case No.: 67, 103, an Appeal from a conviction for a Pasco County Murder involving a victim named Virginia Johnson." (Answer Brief pg. 13).

It is noteworthy, however, that when new counsel (Ellis S. Rubin) for the Defendant entered the case, he was confined by the Court to the parameters of the Plea Agreement and thus prohibited from attacking the admissibility of the unconstitutionally obtained evidence by way of a Motion To Suppress. (R 1434, 1672). Since the Plea Agreement is void and should be set aside, the Appellant should not be penalized for any lack of proof in the Record that the confession and knife were obtained in violation of the Defendant's constitutional rights. Nevertheless, the Appellant has preserved this issue for review by this Court in his objections to the admissibility of the said evidence at the June 24, 1986 and July 8, 1986 Pre-trial hearings as well as the objections raised at the Sentencing Phase on July 10, 1986. (R. 1434-1435, 1668, 1669, 1672-1673, 4-5, 581-582).

Furthermore, the Appellant has filed a Motion For Supplementation of the Record in the instant case by Adoption of the appellate record in Case No.: 67, 103 (Pasco Case). The basis for the Motion is that the statement introduced at the sentencing phase in the instant case involving the murder of Michelle Denise Simms was obtained in the same "confessional" transaction and occurrence that included the Defendant's statement in the Virginia Johnson (Pasco Case). Thus, crucial to

both appeals pending before this Court is the same issue, i.e., the admissibility of the Defendant's unconstitutionally obtained statements with respect to all of the murders and more specifically the Virginia Johnson murder in Appeal Case No. 67, 103 and the Michelle Denise Simms murder in the case at bar.

ISSUE IV.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY WHERE THE SENTENCING PROCESS IMPROPERLY INCLUDED AGGRAVATING CIRCUMSTANCES WHICH THUS RENDERS THE DEATH SENTENCE UNCONSTITUTIONAL.

In Huckaby v. State, 343 So. 2d. 29 (Fla. 1977) the Florida Supreme Court found that although there was insufficient proof of legal insanity, the evidence nevertheless showed that Huckaby's mental illness was a motivating factor in the commission of the crime. The Florida Supreme Court reversed the trial Court's imposition of the death penalty and held that the mitigating circumstances outweighed the aggravating circumstances. As the Court stated:

> Our decision here is based on the causal relationship between the mitigating and aggravating circumstances. The heinous and atrocious manner in which this crime was perpetrated, and the harm to which the members of Huckaby's family were exposed, were the direct consequence of his mental illness, so far as the record reveals.

Furthermore, in Mason v. State, 438 So. 2d 374 (Fla. 1983) the Florida Supreme Court stated that F. S. §921.141(5)(i), [that the homocide was committed in a cold, calculated and premeditated manner], "relates more to the killer's state of mind,

intent and motivation." Id. at. 379.

In the instant case, Dr. Lewis, Dr. Berland, Dr. Heidi and Dr. Afield all confirmed that the Defendant was under the influence of an extreme mental or emotional disturbance when he committed the murder of Michelle Denise Simms and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired. Therefore, there was overwhelming testimony in support of the causal connection between the Defendant's mental disturbances and the violent crimes.

The Court itself found the above two mitigating circumstances to be present and stated in the Order of Sentence as follows:

> The Court believes that it has been sufficiently proven that at some point in the commission of the crime against Michelle Denise Simms that the capacity of the Defendant, ROBERT JOE LONG, to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, and that at the same point the Defendant had a substantial impairment of the ability to conform his conduct to the requirements of law. However, this mitigating circumstance as just defined, and limited by the Court, is not sufficient to offset the Court's belief that until that certain point in the commission of the criminal acts against Michelle Denise Simms, and for a considerable time before, that the Defendant, ROBERT JOE LONG, had full capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law. (R. 1496).

The State asserts that, "The weight to be accorded the aggravating and mitigating circumstances is for the judge and jury, and cannot be disturbed simply because Appellant

reaches a different conclusion from the evidence then did the judge or jury." (Answer Brief pg. 21).

The Trial Judge however, incorrectly arrived at a conclusion that was inconsistent with its findings. It was internally inconsistent for the Court to recognize that at some point in the commission of the crime against Michelle Denise Simms that the Defendant failed to appreciate the criminality of his conduct and that the Defendant had a substantial impairment of the ability to conform his conduct to the requirements of law and still reach the conclusion that the Defendant had full capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.

Therefore, due to the proven causal relationship between the mitigating circumstances and the two aggravating circumstances (that the homocide was especially heinous and atrocious or cruel and that the homocide was committed in a cold, calculated and premeditated manner) the Trial Court thus erred in finding and weighing two of the four aggravating circumstances.

Even assuming arguendo that the remaining two aggravating circumstances are valid, they would not outweigh the two mitigating circumstances found by the Court. The errors and misapplications of the sentence weighing process renders the Appellant's death sentence unconstitutional under the Eigth and Fourteenth Amendments.

CONCLUSION

Based upon the reasons presented in the Initial Brief and this Reply Brief, Appellant, ROBERT JOE LONG, asks this Court to set aside the Plea Agreement and reverse this case for a new trial. Alternatively, for the reasons expressed in the Initial Brief and this Reply Brief, Appellant, ROBERT JOE LONG, asks this Court to reduce his death sentence to life imprisonment.

Respectfully submitted,

ELLIS RUBIN LAW OFFICES, P.A.
Attorneys for Appellant
265 N.E. 26th Terrace
Miami, Florida 33137
305/576-5600 (Miami)
305/524-5600 (Ft. Laud.)

BY: David M. Rappaport
DAVID M. RAPPAPORT
For the Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct coy of this Appellant's Reply Brief was mailed to: James Young, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602; this 26th day of October, 1987.

ELLIS RUBIN LAW OFFICES, P.A.
Attorneys for Defendant/Appellant
265 N.E. 26th Terrace
Miami, Florida 33137
305/576-5600 (Miami)
305/524-5600 (Ft. Laud.)

BY: David M. Rappaport
DAVID M. RAPPAPORT
For the Firm