IN THE SUPREME COURT OF FLORIDA

RAYMOND THOMPSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

APPEAL NO. 69,352

(CASE NO. 85-899CFA)

ON APPEAL FROM THE CIRCUIT COURT, SEVENTEENTH JUDICIAL CIRCUIT, BROWARD COUNTY, FLORIDA - CRIMINAL DIVISION

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

Appellant rests on the Statement of the Case and Facts contained in his Initial Brief with the following addition:

After the trial, but prior to the sentencing in this case, the trial judge received a letter from one of the State's witnesses, Carole McLaughlin, a friend of the deceased, James Savoy (R.2951). Although the court below eliminated any reference to this letter in its written sentencing order (R.3349), when the court orally delivered that order it included McLaughlin's letter in its entirety, saying:

> I received a letter on August 8th, 1986, and I would like to read it to you. I think it is very appropriate. I don't think anybody has seen it. It says, 'Judge Kaplan, I don't know if you remember me, but I was a state witness in the above case, State of Florida versus Raymond Thompson. I underrtand the sentencing date has been postponed until August 21st, 1986. I am writing this letter against the advice of my family and with a lot of trepidation, but I feel I must. James Savoy war my friend. He was a decent human being. He wasn't mean or vicious. I don't know what his actual involvement with Thompson was. I don't think, knowing Jimmy, that he fully realized what he was getting involved with. But regardless, no one deserved to be killed the way he was. What made it more heinous was that he was held at least 24 hours knowing full well what his fate was. I cannot even allow myself to think of the mental torture he must have went through. This is an inherently vicious evil act. When you sentence this Thompson, please consider this. I read that Attorney Roy Black said that about his client 'This is not an abstract principle we're dealing with, this is a human being.' Well, James Savoy was a human being. James Savoy was a son, James Savoy was a father, he was a grandfather and James Savoy was a friend and we loved him.' Signed by Charles (sic) McLaughlin.
> The Court cannot accept the recommendation of the jury in this case.

R.2951-2952.

OUESTION PRESENTED

WHETHER THE TRIAL COURT'S IMPOSITION OF THE DEATH PENALTY OVERRIDING THE JURY'S RECOMMENDATION OF LIFE WAS ERROR ON ALL THE FACTS OF THIS CASE, INCLUDING THE FACT THAT THE TRIAL COURT ERRONEOUSLY CONSIDERED IMPROPER AND PREJUDICIAL VICTIM IMPACT EVIDENCE IN VIOLATION OF Booth v. Maryland, ___ U.S. ___. 107 S.Ct. 2529 (1987)?

SUMMARY OF ARGUMENT

The trial court's override of the jury's recommendation of life was improper. The facts suggesting a sentence of death were not so clear and convincing that no reasonable person could differ. In addition, the trial judge improperly found aggravating circumstances which were not proved beyond a reasonable doubt, improperly considered victim impact evidence, and improperly considered trial defense counsel's skill as non-statutory, and therefore forbidden, aggravating factors.

ARGUMENT

Appellant's Initial Brief set out at length the evidence put to the jury in mitigation of sentence. Appellant's Brief, pp 30-35. There was substantial evidence of mitigating factors on which this jury reasonably based its recommendation of life and that recommendation should not have been overridden.

The trial judge, however, asserted that several aggravating factors warranted a sentence of death. Appellant will not repeat all the arguments made in his Initial Brief. However, some further discussion is required as to some of the points.

A. The Aggravating Factor of Pecuniary Gain.

This Courts recent decision in Hardwick v. State, 13 FLW 83 (Fla. Feb. 12, 1988), establishes that the trial judge in the instant case erred in finding as an aggravating circumstance that

the killing here was for pecuniary gain.

In Hardwick, the defendant murdered Pullum because he had stolen drugs from the defendant. The trial judge found, as an aggravating factor, that the defendant killed for pecuniary gain. This Court ruled that this aggravating factor was not established beyond a reasonable doubt, saying:

> Although there was evidence that Hardwick killed Pullum for stealing Quaaludes, this fact alone does not establish that the killing itself was to obtain financial gain. In the past, we have permitted this aggravating factor only where the murder is an integral step in obtaining some sought after specific gain. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). See, Simmons v. State, 419 So.2d 316 (Fla. 1982). Since any financial advantage Hardwick could have expected in this case at most was indirect and uncertain, we cannot conclude that this aggravating factor existed beyond a reasonable doubt.

13 FLW at 85.

Similarly, in the present case, the aggravating factor of killing for pecuniary gain was not proved beyond a reasonable doubt and the trial judge erred in considering it. The killing of Savoy was not "an integral step in obtaining some sought-after specific gain"; indeed, when Savoy was killed, Appellant and the accomplices knew that the money Savoy stole from them was gone. (R.951). Further, there was absolutely no evidence that Appellant thought Savoy might have his money or that Appellant might be able to locate the money if Savoy was dead. Therefore, at the very most, any financial advantage that Appellant might have expected was indirect, uncertain and merely speculative. That being the case, this aggravating factor was not proved beyond a reasonable doubt and must be excluded from consideration.

B. The Trial Court's Consideration of the Carole McLaughlin Letter.

A careful examination of the record in this case, in light of Booth v. Maryland, ___ U.S. ___, 107 S.Ct. 2529 (1987), as interpreted by this Court's recent decision in Grossman v. State, 13 FLW 127, 131 (Fla. Feb. 26, 1988), reveals that the trial judge improperly considered "victim impact" evidence in reaching the decision to override the jury's recommendation of life.

The sentencer in a capital case may impose death only on the basis of the statutorily delineated aggravating factors, which do not include victim impact. Section 921.141, Fla.Stat. (1985). Therefore, Section 921.143, Fla.Stat. (1985), which permitted the next-of-kin of a homicide victim to give a sworn statement to the court about the impact of the loss of the deceased, was held invalid by this Court in Grossman to the extent that it permitted consideration of victim impact evidence as an aggravating factor. 13 FLW at 131.

In the instant case, several errors prejudicial to the Appellant coincided on this issue and together resulted in fundamental error. First, even if Section 921.143 had not been held to be invalid, the letter of Carole McLaughlin should never have been considered by the trial judge since she was not James Savoy's next-of-kin, but only his friend, nor was her statement sworn, as required by the statute (R.2951). Thus, this was not competent victim impact evidence and could not properly have been considered by the trial judge.

Second, it is apparent in this case that the trial court was swayed, at least in part, by this incompetent and prejudicial

evidence in reaching its decision to override the jury's recommendation of life. At the sentencing, the trial judge read his written findings into the record. Halfway through reading his written order, the judge delivered his reading of this letter with his comment that this letter, which none of the lawyers had seen, was very appropriate. Clearly, since the trial court felt this letter was very appropriate and should be shared on the record, that alone is a strong indication that the trial court considered, and was affected by, the force of this letter in reaching its decision to override the jury's recommendation of life.

It is true that trial counsel did not object to the reading of this letter by the trial court. However, in this case, the failure to object does not preclude Appellate review for two reasons. First, counsel was not timely advised of the existence of this incompetent evidence or of the court's intention to consider it in aggravation. At counsel's first opportunity to object, the objection was already rendered futile: the damage had already been done since the trial judge had already read and relied on the letter. It is well settled that where an objection would be futile, counsel is not required to engage in meaningless acts.

Second, the failure to object does not bar review in this case because the error is fundamental. As the United States Supreme Court noted in Booth

> ... our decision today is guided by the fact death is a 'punishment different from all other sanctions' (citation omitted), and that therefore the considerations that inform the sentencing decision may be different from those that

might be relevant to other liability or punishment determinations.

107 S.Ct. at 2536, n.12.

Death is fundamentally different from all other sanctions and that is part of the basis for the rule of Tedder v. State, 322 So.2d 908 (Fla. 1975), that the jury's recommendation of life must be sustained unless those facts which suggest that death is the only appropriate penalty are so clear and convincing that virtually no reasonable person could differ. Because this jury recommended life, it is fundamentally unfair, as well as unconstitutional, to permit a trial judge to consider evidence which would be denied to the jury because it creates a constitutionally unacceptable risk that death may be imposed arbitrarily and capriciously. Once that evidence has been considered by a trial judge, there is then the same constitutionally unacceptable risk that it may arbitrarily and capriciously contribute to a judge's determination to override the jury's recommendation of life.

In Grossman, of course, the jury unanimously recommended death and the trial judge imposed the death sentence. On those facts, this Court held that there was no fundamental or prejudicial error. 13 FLW at 133. In the instant case, however, the jury that never heard this incompetent evidence recommended that Appellant be sentenced to life imprisonment. Where, as here, the sentencer overrides the life recommendation the sentence cannot be upheld if consideration of non-statutory aggravating circumstances played any role in the determination to override.

C. The Trial Court Improperly Considered Defense Counsel's Expertise as an Aggravating Factor.

As noted in Appellant's Initial Brief, the trial judge overrode the jury's recommendation of life on the ground that defense counsel was too competent. Notwithstanding evidence of statutory and non-statutory mitigating factors, the trial judge found, and the State now argues, that the jury could not reaaonably recommend life and, therefore, that recommendation could only be attributed to counsel's persuasiveness. See, R.3348 and Appellee's Brief, p.48.

By its finding, the trial court has gone beyond the limitations of Section 921.141 Fla.Stat. and adopted an additional aggravating factor on which to base a death sentence, i.e., the adequacy of counsel. This the court may not do.

Even so, a paradox is apparent in the reasoning of the trial court here. According to the reasoning of the court's sentencing order, if a jury recommends life that recommendation must be overridden if competent or exceptional counsel reprerented the defendant because then the jury's recommendation would be baaed only on counsel's eloquence. But, if the defendant is represented by incompetent or marginal counsel, then, presumably, a recommendation of life could safely be sustained because the trial court would know that the jury's recommendation was based only on the evidence and not on counsel's forensic performance!

It should not be necessary to point out that justice can never be served by preferring less competent or incompetent counsel over competent defense lawyers. Yet, if Appellant can be executed, over the jury's recommendation to the contrary, because

he hired a good lawyer, there is just such an improper preference at work.

Surely, this Court would not prefer to see inadequate counsel representing any criminal defendant, much less representing capital defendants. It must be improper, then, for a trial court to penalize a defendant for engaging the best possible lawyer to assist him in his defense. Nevertheless, that is exactly what the trial judge did in this case.

And what a penalty it was! Death. In contravention of, and without due regard for, the jury's recommendation of life, the trial judge sentenced Raymond Thompson to die. That sentence was not in spite of able counsel's efforts but because of able counsel's efforts; because counsel was, according to the trial court, so good that the jury must have been mislead and therefore, must be overridden. This reasoning flies in the face of the exacting Tedder standard.

Under Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), a jury's recommendation of life should be given great weight and a death sentence overriding such a recommendation can be sustained only when the facts that suggest a death sentence are so clear and convincing that reasonable people could not differ. This standard is constitutional; the protection provided by the standard is important to achieve a constitutional death penalty sentencing provision. Spaziano v. Florida, 468 U.S. 447 (1984); Dobbert v. Florida, 432 U.S. 282 (1977). The protection provided by the Tedder standard is nullified if the trial judge can bypass the statutory requirements and consider non-statutory aggravating

factors not submitted to the jury as warranting an override of the jury's recommendation.

Appellant maintains that the skill of his lawyer is neither a statutory aggravating factor that may be considered nor an appropriate basis to override a jury's recommendation of life, This jury had ample reasonable basis for recommending life rather than death:

Savoy's body was never found in spite of specific directions to the alleged murder site, This fact, taken together with evidence that Savoy was seen by several people after the alleged murder date, could have created a lingering doubt in the minds of the jurors that reasonably served as the basis for their recommendation of life. That a reasonable jury could so find is confirmed and reinforced by the additional facts that no money, no safe, no gun, no trace of Savoy's car and no chains were ever found, notwithetanding the State's extensive search for any shred of physical evidence that would establish that this crime was committed and that Appellant committed it. This evidence, and this lack of evidence, together with all the evidence presented of other mitigating factors formed a reasonable basis for the jury's recommendation of life. That recommendation should not have been overridden.

CONCLUSION

For the reasons stated in Appellant's Initial Brief and in this Reply Brief, the judgment of the trial court should be REVERSED and a new trial ordered or, in the alternative, the sentence of death should be REVERSED and a sentence of life imposed.

Respectfully submitted,

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E OF SERVICE

I l CERtIF t l a l and cor ct copy of the foregoing Appellant's Reply Brief ha8 been furnished by mail to Deborah Guller, Assistant Attorney General, Attorney General's Office, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 4th day of Hay, 1988.

By: JANE D. FISHMAN, ESQ.