IN THE SUPREME COURT OF FLORIDA

JOHN EDWARD MERRITT,

Appellant,

v. CASE NO. 69,353

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

ANN COCHEU
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

FLORIDA BAR NUMBER
255785

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

JOHN EDWARD MERRITT,

Appellant,

v. CASE NO. 69,353

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

References to Appellee's Answer Brief will be by "AB", followed by the appropriate page in parentheses. All other references remain the same.

II STATEMENT OF THE CASE AND OF THE FACTS

Appellant has no additions or corrections.

III SUMMARY OF ARGUMENT

Guilt Phase

Appellant replies in Issues I and II that Appellee failed to carry his burden under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) to demonstrate the errors asserted did not affect the jury verdict.

Penalty Phase

Appellant replies in Issues V, VI, and VII that there was no factual basis for finding witness elimination and cold

calculated and premeditated as aggravating factors and that the trial judge improperly doubled these factors. He also argues in Issue VIII that the override of the life recommendation does not meet the Tedder standard and that appellee's reasons are unsupported by the record.

IV ARGUMENT

ISSUE I

THE TRIAL COURT REVERSIBLY ERRED IN PERMITTING THE STATE TO INTRODUCE IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF COLLATERAL BAD ACTS AND CRIMES, THEREBY DEPRIVING APPELLANT OF HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellee opines the so-called death-pact was relevant to prove modus operandi (AB-6). Yet there was nothing unique about the fact a burglar was armed with a firearm; the legislature addressed that aspect of criminal behavior by enhancing the penalty for armed burglary. Nor does the fact that an individual was shot in his house provide any unusual characteristics to point to the defendant as the perpetrator.

Contrary to appellee's assertion, the collateral bad acts were intended to demonstrate propensity which is improper. Identify of the murderer was the sole disputed issue. By introducing subsequent bad acts and intentions to commit bad acts if certain contingencies occur, i.e. someone comes in on a burglary in progress, the state argued this connected John Merritt to the crime.

Appellee without any legal support asserted that the "trial court did not abuse his discretion by allowing the jury to hear this evidence." (AB-6). He failed to show how these acts provided any "signature" of the crime positively pointing to appellant, nor did he address the second aspect of appellant's

argument, prejudice. Instead appellee broadly hinted this was harmless error.

Admission of collateral bad acts which do not meet the rigid tests for relevancy, as appellant argued in his initial brief, is presumed harmful. Lee v. State, 12 FLW 1498 (Fla. 1st DCA June 17, 1987). As the beneficiary of this error, the burden is on the state to show the error was harmless. There can be no doubt such evidence had a reasonable possibility of affecting the verdict; the state simply had no other proof of identity. Merely arguing trial court discretion, appellee offered no reasons why the collateral acts were harmless. Appellant therefore is entitled to a new trial. See State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986).

ISSUE II

THE TRIAL COURT DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE JUDGE ADMITTED "FLIGHT" TESTIMONY AND ERRONEOUSLY INSTRUCTED THE JURY ON "FLIGHT."

Appellee's cursory answer (AB-8) failed to address the argument that the jury instruction did not fit the evidence[1] and that the state was permitted to use a misleading inference. The prosecutor acknowledged that Mr. Merritt was being extradited on

---

[1]Contrary to Appellee's assertion that appellant did not object (AB-8), during the proffer of flight testimony, appellant objected to the testimony and the proposed instruction (R-735-36).

other charges, yet he was allowed to argue the escape was circumstantial evidence of guilt of the murder. Appellant was left with a Hobson's choice which he remedied by testifying he had other pending charges (R-800-801). When construed in light of the matters raised in Issue I, supra, the prejudicial impact was clear.

Curiously, in Issue III, appellee argued that this case was based entirely upon direct, not circumstantial, evidence (AB-9). Clearly appellee concedes that the flight testimony was irrelevant. Again, appellee failed to carry his burden under State v. DiGuilio, supra, and appellant is entitled to a new trial.

ISSUE V

THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

In order to sustain a finding of a statutory aggravating circumstance, the facts must be proven beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). Appellee's only theory was, "when a 14 year old daughter introduces her father to a man in his early twenties who wants to go out with her a father is going to take notice." (AB-14). Such speculation belies the fact two years before his death, Mr. Davis met appellant and a group of his daughter's friends twice for a few minutes when "the gang" came by the house (R-634-37). At best this was a casual encounter. Appellee's theory hardly meets the standard of proof established by this Court and previously argued by appellant.

ISSUE VI

THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Appellant is not, as Appellee asserts (AB-15), asking this Court to delete section 921.141 (5)(i), Florida Statutes (1985); rather, Appellant requests this Court to apply the same legal standards to him that it has consistently applied in capital appeals: was there proof of heightened premeditation and was that proven beyond a reasonable doubt? E.g. Richardson v. State, 437 So.2d 1091 (Fla.. 1983). Otherwise, in any first degree murder not founded upon a felony murder theory, there would be an automatic finding of this aggravating factor.

That items were "arranged in piles" (AB-16) but not stolen from the house supported the trial judge's conclusion that the victim "surprised the Defendant during the course of the burglary." (R-1172). Such a finding hardly demonstrated heightened premeditation or planning nor could appellee present argument that it did.

ISSUE VII

THE TRIAL COURT ERRED IN FINDING AS ALTERNATIVE AGGRAVATING CIRCUMSTANCES THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST AND THAT IT WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellee's response to appellant's doubling argument (AB-17-18) completely ignores the fact that the trial judge's sentencing order on its face revealed he relied upon the same evidence and the same essential facts in finding these aggravating circumstances. Any possible hypothetical reasons proffered by appellee for the judge's findings are immaterial; the judge's order, not counsel's speculation, controls. There was an improper doubling. Waterhouse v. State, 429 So.2d 301, 307 (Fla. 1983).

ISSUE VIII

APPELLANT'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE ABSOLUTELY NO CONSIDERATION WAS GIVEN TO THE JURY'S LIFE RECOMMENDATION, WHICH EVEN THE STATE RECOGNIZED WAS REASONABLE, AND BECAUSE LITTLE WEIGHT WAS GIVEN TO THE UNREBUTTED NON-STATUTORY MITIGATING EVIDENCE.

Once more the state begs this Court to recede from the Tedder standard. Amazingly, appellee added his reasons (AB-22) to those enunciated by the sentencing judge to justify the override. For whatever strategic reasons, the prosecutor chose not to present appellant's robbery conviction to the jury. Judge Lawrence was aware of it but did not make any such finding in aggravation.[2]

---

[2]Indeed, many matters may come to a trial judge's attention that jurors never know. That underscores the importance of a written sentencing order in death cases to apprise this Court of the judge's factual basis for imposing a death sentence.

Appellee curiously cited Caldwell v. Mississippi, 105 S.Ct. 2633 (1985) and Booth v. Maryland, 41 Cr.L. 3282 (June 15, 1987) (AB-20,21), to imply that the state's errors tainted the sentencing process in appellant's favor.[3] To correct this egregious wrong, appellee argues, this Court must uphold the death sentence, not simply for reasons stated by Judge Lawrence, but also for reasons presented by appellee.

Because appellee has not demonstrated from matters properly before this Court that reasonable persons, including a jury and two prosecutors for the Third Judicial Circuit, could not differ

---

[3]Appellee frequently argues lack of preservation i.e. Steinhost v. State, 412 So.2d 332 (Fla. 1982) and Castor v. State, 365 So.2d 701 (Fla. 1978) to bind a defendant's appellate counsel to the acts of trial counsel. Somehow he assumes it is perfectly acceptable to argue facts and theories not a part of the record sub judice, or worse, maintain contradictory positions. That a prosecutor concedes life is appropriate should not be that offensive. The ABA standards on Criminal Justice Relating to the Prosecution Function 1.1(c) admonishes: "The duty of the prosecutor is to seek justice, not merely to convict."
These standards have been adopted by Florida. See comment to Rule 4-3.8 Rules of Professional Conduct.

Appellee also improperly digresses on an ad hominem attack on both the prosecutor (AB-22) and the First District Court (AB-21). Appellant strongly objects to counsel's assertion that all appellant's "Florida cases are currently on appeal where he is challenging the sufficiency of the evidence to the conviction" and his footnote 2 (AB-21). Collateral relief has no bearing on the reasoned decision of the issues currently before the Court. Secondly in case 80-175, the only other case of appellant before a Florida appellate Court, counsel for appellee sub judice also represents the state before the First District Court. He knows quite well sufficiency of the evidence was raised as to one of the four felonies. To insinuate otherwise to this Court is scandalous.

on a life recommendation, appellant requests a reduction of his sentence to life.

V CONCLUSION

Wherefore appellant seeks a new trial under Issues I and II and in the alternative, a reduction of his death sentence in Issues V, VI, VII, and VIII.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

ANN COCHEU
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to Gary L. Printy, Assistant Attorney General, The Capitol, Tallahassee, Florida and mailed to appellant, John Edward Merritt, #058704, S-3-South-6, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 17 day of July, 1987.

ANN COCHEU