IN THE SUPREME COURT OF FLORIDA

JASON DIRK WALTON, :

Appellant, :

vs. : Case No. 69,389

STATE OF FLORIDA, :

Appellee. :

_____ :

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, Jason Dirk Walton, 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

The introduction of victim impact evidence in Walton's trial was more prejudicial than it was in this Court's decision of Grossman v. State, Case No. 68,096 because some of it was presented to the jury. The circumstances of this case show that the error was not harmless. Since the reliability of Walton's sentence of death does not meet the Eighth Amendment's exacting standard, his failure to object at trial to victim impact evidence should not bar relief.

Appellee's contention that defense counsel introduced the subject of remorse as a sentencing consideration and that the prosecutor was merely rebutting this evidence is not supported by the record. Walton did not invite the so-called "rebuttal" evidence concerning his attendance at one victim's funeral and purchase of his truck. He also made an adequate objection to testimony on this subject.

Appellee's contention that the doctored jury instructions did not shift the burden from the State to prove each aggravating circumstance beyond a reasonable doubt is incorrect. A fair reading of the jury instructions shows that the jury may well have taken the court's instructions as conclusive.

Certain details which Appellee cited as supporting the sentencing judge's rejection of Walton's lack of prior convictions as a mitigating circumstance and the court's finding that the cold, calculated and premeditated aggravating factor applied are not supported by the record. The court's sentencing order reflects a failure to consider non-statutory mitigating evidence and not merely inartful drafting.

ARGUMENTS

ISSUE I

IN VIOLATION OF THE EIGHTH AMENDMENT, UNITED STATES CONSTITUTION, THE STATE PRESENTED EVIDENCE CONCERNING THE IMPACT OF THE CRIME UPON THE CHILD, CHRIS FRIDELLA, AND TESTIMONY BY THE SURVIVING PARENTS OF STEPHEN FRIDELLA URGING THAT WALTON BE SENTENCED TO DEATH.

Since this issue was formulated in Appellant's Initial Brief, this Court has decided Grossman v. State, Case No. 68,096 (Fla. February 18, 1988) [13 FLW 127]. As Appellee notes, Grossman also presents a claim arising under Booth v. Maryland, 107 S.Ct. 2529 (1987) to which no objection was raised in the trial court. However, the case at bar is distinguishable from Grossman and requires a different result.

To begin with, the victim impact evidence in Grossman was presented only to the sentencing judge. Thus, there was no possibility that the jury's 12-0 death recommendation could have been influenced by inflammatory victim impact evidence. By contrast, Walton's penalty jury heard evidence concerning the impact of the homicides on Chris Fridella and argument by the prosecutor urging this is a basis for a death sentence. The death recommendation of 9-3 may have been tainted by this irrelevant and inflammatory evidence.

This Court's decision in Grossman was grounded on two separate rationales, procedural default and harmless error. Considering the second of these first, the victim impact evidence in Grossman was harmless error because there were substantial aggravating

circumstances to support the jury's death recommendation and a lack of mitigating evidence. As mentioned above, Grossman's jury recommendation could not have been tainted because it never heard the victim impact evidence. At bar, however, Walton presented considerable statutory and non-statutory mitigating evidence concerning his lack of any previous conviction, honorable military service, non-violent temperment, good employment record and positive adjustment to prison. A co-defendant who was an actual triggerman in these homicides received a jury life recommendation and eventual life sentence after review by this Court. See VanRoyal v. State, 497 So.2d 625 (Fla. 1986). A reasonable jury could have recommended life for Walton and a jury override sentence of death would not have passed muster under Tedder v. State, 322 So.2d 908 (Fla. 1975). Accordingly, the victim impact evidence presented by the State in Walton's case cannot be treated as harmless error.

Appellee urges this Court to give Walton no relief based upon his failure to object to victim impact evidence at trial. This, of course, was the alternate rationale for this Court's decision in Grossman. However, it must be remembered that a Booth violation affects the reliability of a capital sentencing proceeding in contravention of the Eighth Amendment, United States Constitution. Justice Barkett observed in her concurring opinion to Phillips v. Dugger, 515 So.2d 227 (Fla. 1987):

> I cannot agree that a procedural bar, resting as it does on the concept of waiver by default, permits the courts of any state to affirm a death sentence that bears the indicia of unreliability. 515 So.2d at 228.

Because Walton's jury recommendation and sentence of death are unreliable due to the prejudicial introduction of evidence concerning the impact of the homicides on Chris Fridella, Walton's sentence of death should be vacated and a new penalty trial ordered.

ISSUE II

THE ERRONEOUS ADMISSION OF PREJUDICIAL EVIDENCE CONCERNING WALTON'S ACTIONS AFTER THE HOMICIDES AND ALLEGED LACK OF REMORSE DEPRIVED WALTON OF A FAIR PENALTY TRIAL AND CAPITAL SENTENCING.

Appellee contends in his brief (at page 14-15) that the subject of remorse was introduced as a sentencing consideration by Walton. He refers to defense counsel's direct examination of witness Kimberly Johnson, the relevant portion of which reads:

> Q. Okay. You were able to observe him both before and after this incident occurred, correct?
>
> A. Yes.
>
> Q. What if any changes did you notice in him after June 18th, 1982?
>
> A. Quieter, didn't talk to me quite as much.
>
> Q. Uh-huh.
>
> A. That was it.

(R748-9)

How this questioning opened the door for the prosecutor's question on cross-examination "did he ever express any remorse to you or sorrow about the crimes he had committed" (R753) is beyond Appellant's comprehension. Johnson didn't say a word about remorse on direct examination; she merely said Walton became quieter. The testimony is more susceptible to an interpretation that Walton was concerned about being apprehended for the homicides than it is to a suggestion of remorse.

Appellee's brief then recites portions of the direct and cross-examination of Lynn Shamber. Brief of Appellee p.12-13.

Everything presented in Appellee's brief was perfectly proper and was not contested in Appellant's initial brief. Appellee, however, failed to respond to Appellant's assertion in his initial brief that questioning Shamber whether she knew that Walton had attended the funeral of one victim and later bought his truck was improper.

Contrary to Appellee's assertion at p.13 of his brief, Walton's counsel did object to introduction of testimony concerning Walton's attendance at Gary Peterson's funeral and the purchase of his truck. The objection came when the subject first arose during Shamber's testimony (R767-8). The court overruled the objection (R768). Because of the court's ruling, it would have been futile for defense counsel to again object to the same evidence when it was introduced through "rebuttal" witness John Gray, Jr. (R791-3).

Appellee's reliance on Agan v. State, 445 So.2d 326 (Fla. 1983), cert.den., 469 U.S. 873 (1984) is misplaced. In Agan, the defendant waived his right to jury trial in both the guilt and penalty phases. Thus, there was no possibility that absence of remorse could have inflamed the jury into returning a death recommendation the way that the prosecutor's summation at bar may have. See R835-6.

ISSUE III

THE TRIAL COURT ERRED BY ALLOWING INTRODUCTION OF ALLEGED PRIOR DRUG OFFENSES WHICH DID NOT RESULT IN CONVICTION AS REBUTTAL TO THE MITIGATING CIRCUMSTANCE §921.141(6)(a), FLORIDA STATUTES (1985)

ISSUE IV

THE PROSECUTOR'S IMPROPER REMARKS DURING CLOSING ARGUMENT VIOLATED WALTON'S RIGHTS UNDER THE FLORIDA CONSTITUTION, ART. 1, §9, AND THE UNITED STATES CONSTITUTION, AMENDMENTS V, VIII AND XIV.

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

ISSUE V

THE TRIAL JUDGE'S INSTRUCTIONS TO THE JURY ERRONEOUSLY DIRECTED THE JURY TO FIND SIX AGGRAVATING CIRCUMSTANCES, IMPROPERLY DOUBLED TWO AGGRAVATING FACTORS AND WRONGLY DEFINED ONE AGGRAVATING CIRCUMSTANCE.

The crux of Appellee's argument in his brief is that the court's direction to the jury that they "must consider" six aggravating circumstances did not shift the state's burden to prove each of the six aggravating circumstances beyond a reasonable doubt. The appropriate inquiry is that which was set forth by the United States Supreme Court in Francis v. Franklin, 471 U.S. 307 (1985):

> If a specific portion of the jury charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of the offense, the potentially offending words must be considered in the context of the charge as a whole. 471 U.S. at 315.

To this end, Appellee notes the trial court's instruction prior to listing the aggravating circumstances. The jury's duty was described as:

> ... to render to the Court an advisory sentence based on your recommendation as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R852)

Although Appellee contends that stress should be placed on the words "whether" and "exist" (Brief of Appellee, p.29), the more likely word to be stressed is "sufficient". This part of the charge does not clearly tell the jury whether their role is to find whether aggravators and mitigators have been proved or whether their role is merely to weigh the aggravators and mitigators given to them by the trial judge.

The same ambiguity is present in the next part of the charge noted in Appellee's brief. The court's instruction "should you find sufficient aggravating circumstances do exist" (R858, Brief of Appellee p.29-30) may be reasonably read to infer that the juror's role is to find sufficiency rather than existence.

The only part of the jury charge which informs the jury of the need for proof beyond a reasonable doubt is that cited by Appellee in his brief at p.30 and repeated here:

> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

(R858)

However, this portion of the jury charge merely states that each aggravating circumstance "must be established beyond a reasonable doubt"; it does not inform the jury whether the court or the jury decides establishment. The jury is also told that each aggravator must be established "before it may be considered by you". Since the court already told the jury that they "must consider" the six aggravating factors listed (R852-3,108-9), a reasonable juror could conclude that the court already determined that the aggravators were established and, hence, could be considered.

Accordingly, the state's burden to prove each of the aggravating circumstances was impermissibly lifted in violation of the Eighth and Fourteenth Amendments, United States Constitution. Walton should be given a new penalty proceeding.

ISSUE VI

THE SENTENCING JUDGE ERRED BY FAILING TO FIND APPLICABLE MITIGATING FACTORS AND FINDING UNSUPPORTED FACTORS IN AGGRAVATION.

A. The Court Could Have Found the Statutory Mitigating Circumstance of No Significant History of Prior Criminal Activity.

Appellee submits that Walton's confession supports the sentencing judge's conclusion that Walton "had a history of dealing in marijuana, amphetamines and quaaludes" (R200, Brief of Appellee, p.34). However, the reference to amphetamines and quaaludes is ambiguous. Walton told the arresting detectives that he had both purchased marijuana from Gary Peterson and sold it to him (R893, p.17). Walton then mentioned amphetamines and quaaludes but failed to specify whether he had purchased them from Peterson or sold them to him (R893, p.17).

This may seem like a very minor detail, but an unproven assumption that Walton sold amphetamines and quaaludes as well as marijuana may have convinced the sentencing judge to reject this statutory mitigating circumstance. After all, when a defendant has no prior convictions there is at least a strong presumption that he should get the benefit of the no significant history of prior criminal activity mitigator. See Hargrave v. State, 366 So.2d 1 (Fla. 1978).

B. The Court Failed to Consider the Non-Statutory Mitigating Evidence.

Appellee contends in his brief that the sentencing court's listing of each statutory mitigating circumstance with the reason

for its rejection and no mention whatsoever of non-statutory mitigating evidence "reflects merely that the evidence was not mitigating". Brief of Appellee, p36. This Court's decision in Davis v. State, 461 So.2d 67 (Fla. 1984) is cited as authority.

Davis, however, must be distinguished because there was apparently nothing of consequence offered in the way of non-statutory mitigating evidence. By contrast, Walton offered his honorable military service and award, no prior history of violence, record of employment and positive adjustment to prison. Such evidence is definitely entitled to weight in mitigation.

It should also be remembered that this Court's decision in Davis predated the United States Supreme Court's holding in Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. ___, 95 L.Ed.2d 347 (1987). The sentencing court's total failure to mention the non-statutory mitigating evidence coupled with his assertion that he considered "the foregoing" (R201) in deciding the penalty does not meet the Hitchcock standard.

E. The Sentencing Judge Erred in Finding the Aggravating Factor Section 921.141 (5)(i) (cold, calculated and premeditated) Applicable.

In his brief, Appellee urges as proof that these homicides were cold, calculated and premeditated an assertion by McCoy that Walton was pointing his gun at the head of one of the victims when it misfired. Brief of Appellee, p.44. This alleged fact also appears in the court's sentencing order (R200).

Appellee's citations to the record to support this assertion show that Detective Halliday testified that McCoy told him:

> I heard J.D. actually held on to somebody and pulled the trigger ... then I asked him ... he said yes or yeah, he did.

(R609) (e.s.)

Appellee's second citation is also to Detective Halliday's testimony about what McCoy allegedly told him that he heard. (R628-9).

When McCoy actually testified he said "I had heard that he had somebody by the head" (R678). Appellant's hearsay objection was then sustained by the trial judge (R678-9). McCoy said he could't be positive whether he had heard about the alleged incident from Walton himself (R679). He agreed that the misfire could have occurred outside the victim's residence for all he knew (R685-6).

McCoy was emphatic in his testimony that no prearranged plan existed which called for the victims to be shot (R683,689-90). The burglary and robbery of the victims was clearly calculated, the killing was not. Under this Court's decision in Rogers v. State, 511 So.2d 526 (Fla. 1987), the evidence is insufficient to prove the cold, calculated and premediated aggravating circumstance. Cf., Jackson v. State, Case No. 69,197 (Fla. May 5, 1988) [13 FLW 305].

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 8th Floor, 1313 Tampa Street, Tampa, Florida 33602, by mail this 17th day of May, 1988.

Douglas S. Connor

DOUGLAS S. CONNOR