IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,496

ALTON MOORE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT AND REBUTTAL

I.

THE TRIAL COURT ERRED BY ITS REFUSAL TO EXCUSE CERTAIN JURORS FOR CAUSE AND TO GRANT THE DEFENDANT ADDITIONAL PEREMPTORY CHALLENGES, THEREBY ABRIDGING THE DEFENDANT'S RIGHT TO PEREMPTORY CHALLENGES.

The Appellant has clearly demonstrated that the jurors discussed in his first point on appeal had states of mind regarding the guilt or innocence of the Defendant, the Defendant himself, and the case that would prevent them from acting with impartiality. Section 913.03(10), Fla. Stat. (1970).

The Appellee argues that Defendant's sole basis for challenging jurors WOODRUFF and YI was their concern for business and economic hardship. (Brief of Appellee, p. 25). The Appellant challanged Mr. Yi on the basis of the state of mind created by these concerns. At trial, the State understood this and noted its concern as well, with Mr. Yi's state of mind due to the "tremendous loss of money" he would suffer if called upon to serve. (R. 658).

As with Mr. Yi, obviously, if an individual states he would "be broke" if the trial continued through the following week, the juror is not going to have a state of mind conducive to impartiality.

The State in its Brief has overlooked Singer v. State, 109 So. 2d 7 (Fla. 1959), cited by Appellant in his Initial Brief which stands for the proposition that the fact that a juror states he will

follow the law notwithstanding an opinion entertained, will not render him competent if it otherwise appears that his formed opinion is of such a fixed and settled nature as not readily to yield to the evidence. The fact that Mor stated that he believes someone can be legally insane does not render him competent as a juror where he had formed such an opinion as described in Singer.

The dialogue cited by the State in its Brief (from R. 431) clearly demonstrates Mor's fixed opinions regarding sentencing as well. Mor's raising of his hand when asked who believes that when a person is convicted of first degree murder, death is the only penalty, revealed his true thoughts on the issue. He also expressed concern about having to "pay" for other people's mistakes.

Juror Lopez specifically stated that he would be thinking that the Defendant would be getting out sometime in the future and that would probably prevent him from following the Court's instructions. (R. 405-408). The State would have this Court look to form over substance by picking at the words used by defense counsel in his objection and stating that the Defendant raises different ground in his appeal. Juror Tedder (who was excused for cause) answered defense counsel's question about whether he could follow the Court's insanity instructions or be unable to, due to his own views, by stating that he would be bothered by those things. (R. 405-408). The defense attorney moved to strike Lopez for cause because he had the same views as Tedder. (T. 441). In fact, the defense did raise the grounds argued herein and the State is mincing words.

In Hill v. State, 477 So. 2d 553 (Fla. 1985), this Court reiterated the test for determining juror competency:

> . . . whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the Court. Lusk v. State, 446 So. 2d 1038, 1049 (Fla.) cert denied ____U.S.____, 105 S. Ct. 229, 83 L. Ed. 158 (1984).

In order to apply the foregoing test the trial courts are to use the rule set forth in Singer v. State, 109 So. 2d 7, (Fla. 1959):

> If there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial(,) he should be excused on motion of a party, or by (the) court on its own motion. (Cited in Hill, p. 555).

Hill noted the concern over the integrity of juries by citing earlier cases decided by this Court wherein the Court held that "jurors should if possible be not only impartial, but beyond even the suspicion of partiality," O'Connor v. State, 9 Fla. 215, 222 (Fla. 1860); and that "if there is a doubt as to the juror's sense of fairness or his mental integrity, he should be excused." Johnson v. Reynolds, 97 Fla. 591, 598, 121 So. 793, 796 (Fla. 1929).

In light of the prospective jurors' problems with the legal defense of insanity and following the Court's instructions, it cannot be said that there is no reasonable doubt as to the jurors' (who were stricken peremptorily after the Court's refusals to strike for cause) possessing the requisite state of mind to serve. They did not.

The State urges this Court to reconsider a harmless error analysis, citing Rivers v. State, 458 So. 2d 762 (Fla. 1984), a case which was decided prior to Hill. Rivers is easily distinguishable from the case at bar. In Rivers the objection was the Court's refusal to permit backstriking. However, the error was not preserved since the defense did not thereafter attempt to backstrike. Additionally, Rivers dealt with the non-compliance with the Florida Rules of Criminal Procedure which was held under the circumstances noted above to be harmless.

In Hill, as in the case at bar, the challenge was statutory and constitutional. In the case at bar, the defense ran out of peremptory challenges and requested more which was denied by the trial court. The error was preserved for appeal and not harmless. In Hill, this Court held:

> We find that such error cannot be harmless because it abridged Appellant's right to peremptory challenges by reducing the number of those challenges available to him.

It is respectfully submitted that this cause should be remanded for a new trial.

II.

THE MISLEADING JURY INSTRUCTION ON EXCUSABLE HOMICIDE DEPRIVED DEFENDANT OF DUE PROCESS AND A FAIR TRIAL, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND ARTICLE I, SECTION 9, OF THE CONSTITUTION OF THE STATE OF FLORIDA.

The Defendant and State did agree that the excusable homicide instruction should be read to the jury. (R. 1300). The State cannot now argue after agreeing at trial that the manslaughter instruction should be read, that there was no evidence to support same.

In the note next to the Standard Jury Instruction on excusable homicide at page 76 of the Florida Standard Jury Instructions in Criminal Cases, it says, "give 1, 2, or 3 as applicable." The instruction was not read as the note indicates (or F. S. 782.03), in the disjunctive.

While Murray v. State, 491 So. 2d 1120 (Fla. 1986) cited by the State stands for the general proposition that jury instructions must be specifically objected to in order to be properly preserved for appellate review, the instruction in Murray raised a different issue. The issue in Murray was the giving of an instruction on attempted manslaughter. The Defendant's position was that such a crime did not exist. This Court found that attempted manslaughter has long been recognized as a crime in Florida, so an objection was required. The case of Steinhorst v. State, 412 So. 2d 332 (Fla. 1982), stands for the general proposition that objections are necessary for appellate purposes except in the case of fundamental error.

The Third District Court of Appeal has determined that an identical jury instruction (to the one given in the case at bar) was misleading and could not be considered harmless. Parker v. State, 495 So. 2d 1203 (Fla. 3d DCA, 1986) cert den Fla. S. Ct. Case No. 69,664 (Feb. 13, 1987).

The trial court breached its duty to properly instruct the jury on the law applicable to the Defendant's defense. The Defendant's statement as discussed in his Initial Brief at page 34 provided the evidence to support the excusable homicide instruction. It should therefore have been read properly so as not to mislead the jury. The failure to do so constituted fundamental error.

III.

THE TRIAL COURT ERRED BY THE ADMISSION OF RANK HEARSAY IN THE FORM OF AN ALLEGED "DYING DECLARATION" AND A "911 POLICE TAPE RECORDING" THEREBY DEPRIVING THE DEFENDANT OF A FAIR AND IMPARTIAL TRIAL, AND HIS RIGHT OF CONFRONTATION AS GUARANTEED UNDER THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

At trial, the defense objected to the admission of the 911 tape on the basis of relevance, that it did not prove a material fact, that it was not a proper business record, and that one of the providers of the information was someone not involved in the regular course of business. (R. 944). Defense counsel also objected on the basis that the voice identification by REGINA BERGER was unduly suggestive. (R. 954). Further objections made were relevancy, hearsay, it does not fall within the business record exception, and it is highly suggestive. (R. 954).

The Court found "State v. Washington" to be "persuasive" and allowed "that predicate." (R. 956). The Court found the 911 tape to be an exception to the hearsay rule and relevant to identification. (R. 956). The Court noted there were no Florida cases on the admissibility of 911 tapes. (R. 956). The Washington case relied upon by the trial judge was State of Washington v. Rupe, 683 P. 2d 571 (Wash. 1984 en banc), cited by Appellant at page 40 of his Brief. Appellant distinguished the foregoing case from the case at bar at page 41 of his Initial Brief. The Court in Washington did find that the tape might have been prejudicial to the penalty phase and remanded for a new sentencing hearing without the

jury hearing the tape. The State relies on the Washington case in its Brief at page 44. In the very least, a new penalty phase with a jury which has not heard the tape should be conducted.

IV.

THE TRIAL COURT ABANDONED ITS DUTY TO SCRUPULOUSLY GUARD THE RIGHTS OF THE DEFENDANT WHEN IT DENIED DEFENDANT'S MOTION FOR MISTRIAL AFTER THE PROSECUTOR REFERRED TO DEFENSE COUNSEL AS "UNPROFESSIONAL" AND "UNETHICAL" IN FRONT OF THE JURY.

While the State asserts in its Brief at page 45 that the Defendant deleted the "most exciting portions of the argument on his motion for mistrial," it should be noted that this "excitement occurred outside of the presence of the jury, not in front of the jury as did the prosecutor's remarks that defense counsel's comment was unprofessional and unethical. (R. 1213).

Defense counsel did object to the prosecutor's conduct throughout the trial and some of these instances are raised in this appeal as in this Point on Appeal and in Issue VII wherein the State discussed a plea offer of life, then proceeded on death.

Neither side, in this writer's humble opinion, were examples of refined courtroom decorum at sidebar. However, there is no excuse for calling another attorney "unprofessional" and "unethical" in front of a jury. Certainly in this case, such name calling was unwarranted. The defense attorney through a proper legal objection raised the objection that the prosecutor had not read an entire conclusion of a witness. The Court found Defendant's position to be "understandable." (R. 1213). The State's uncalled for and highly inflammatory remark was that the defense counsel's comment was unprofessional and unethical. (R. 1213).

The State is inaccurate when it refers to defense counsel's legal objection as "sarcastic." The Court required the State to read the conclusion defense counsel objected to, hardly making defense counsel appear to have been sarcastic when he objected.

Even in its Brief herein, the State persists in attempting to taint defense counsel's comment by name calling once again.

The issue herein is neither one of name calling nor one which is "ridiculous." It is not exciting and humorous, but sad.

Nothing justifies the State in implying to a jury that counsel for an accused is acting in any manner other than an ethical and professional manner. Such complaints are properly addressed at sidebar, out of the jury's presence. Such accusations seriously undermine the right to counsel as guaranteed by the Constitutions of the United States and of the State of Florida. They further interfere with an accused's right to due process. Such comments cannot be said to have not seriously undermined the fairness of the trial and a mistrial was warranted.

V.

THE ADMISSION INTO EVIDENCE OF SHOCKINGLY GRUESOME POSED PHOTOS OF THE DECEASED ON A TABLE IN THE MEDICAL EXAMINER'S OFFICE, DEPICTING A GAPING, BLOODY KNIFE WOUND TO THE THROAT AND A PORTION OF A SURGEON'S INCISION BENEATH HER BREASTS MADE FOR MEDICAL THERAPY WAS IRRELEVANT, INFLAMMATORY, PREJUDICIAL, AND DEPRIVED THE DEFENDANT OF A FAIR AND IMPARTIAL TRIAL.

The Appellant would respectfully stand by his Initial Brief on the above issue without waiving same.

VI.

THE DEFENDANT WAS DENIES HIS SIXTH AMENDMENT AND ARTICLE I, SECTION 16 RIGHT TO A TRIAL BY AN IMPARTIAL JURY AND HIS FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION OF THE LAWS WHERE THE PROSECUTOR USED PEREMPTORY CHALLENGES TO EXCLUDE JURORS SOLEY ON THE BASIS OF RACE.

The Appellant would respectfully stand by his Initial Brief on the above issue without waiving same.

VII.

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH AFTER A JURY TRIAL WHEN PRIOR TO TRIAL THE DEFENDANT WAS OFFERED A PLEA TO LIFE WHICH HE REJECTED.

The Appellant would respectfully stand by his Initial Brief on the above issue without waiving same.

VIII.

THE POLICE MISCONDUCT IN OBTAINING DEFENDANT'S CONFESSION WAS A DELIBERATE ATTEMPT TO DEPRIVE DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL, RENDERING DEFENDANT'S CONFESSION INVOLUNTARY AND INADMISSIBLE AT TIRAL.

The Appellant would respectfully stand by his Initial Brief on the above issue without waiving same.

IX.

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTION FOR ARMED BURGLARY WITH AN ASSAULT.

The Appellant would respectfully stand by his Initial Brief on the above issue without waiving same.

X.

THE TRIAL COURT ERRED BY FINDING THREE AGGRAVATING FACTORS, AND NO STATUTORY NOR NON-STATUTORY MITIGATING FACTORS.

(Respectfully Amended)

The Appellant would respectfully stand by his Brief as to the aggravating factors. As to the mitigating factors, the Appellant would respectfully argue that the trial court erred by failing to find at least one statutory mitigating factor -- even the State conceded this to the trial court:

> Mr. Band: Your Honor, if it please the Court. We are in agreement to appoint (sic) with counsel as to the nature of the psychological or psychiatric testimony.
>
> We feel, however, there is one aggravating circumstance, like one mitigating circumstance. That is because it is not like the State is put in a position where we can't double. I don't think the Defendant ought to be put in a position where they can double, too, and that's why the jury specifically found in this case that he was not insane, and the aggravating factor, whether the Defendant acted under extreme duress or under the substantial domination of another person. You know, the extreme duress counsel is suggesting is this psychological problem, the mental illness. I suggest it fits much better under the mitigating circumstance, whether or not the Defendant had the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, to conform his conduct to the requirements of the law, (sic) and whether or not that was substantially impaired.
>
> I am not going to argue that point. I think the Court can legitimately make that finding and should make that finding, but I don't think there are two mitigating factors. I am suggesting there is only, in fact, one mitigating factor. That they cannot

> use this mental illness, you know, in each and every category, more than one category, much like the State cannot have felony murder. They can only apply it to one. (R. 1595-1596).

The trial court found that the Defendant was not under the influence of extreme mental or emotional disturbance when Birdie Jenkins was killed. (R. 1613). The trial court further found no evidence that the Defendant did not understand or appreciate the criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired. (R. 1614-1615).

As to the first statutory mitigating factor that the felony was committed while Defendant was under the influence of extreme mental or emotional disturbance, the Defendant would stand by his Initial Brief.

As to the ability of the Defendant to appreciate the criminality of his conduct, and to conform his conduct to the requirements of law (was substantially impaired), the Defendant would state that the trial court erred by not finding this mitigating factor.

There is no question that the Defendant is a chronic schizoid paranoid type as testified to by Drs. Castiello and Reichenberg. (R. 1471, 1477). Dr. Castiello testified as follows:

> Q. Could you, perhaps, in a little more detail as you did the other day, explain what paranoid schizophrenia is?
>
> A. Well, let me start again. Schizophrenia is what is called a major mental disorder; namely, it's the type of illness that is severe for which there is no cure but only

a relief by means of the antipsychotic medications and the manifestations of illness are undue suspiciousness and acting a fantasy life and above and the inability for the individual to properly recognize reality when he is psychotic, namely when the illness is active and manifests itself.

Q. Is all active paranoid schizophrenia?

A. To some degree or another. The manifestation of the illness certainly would change or tend to change from time to time accept (sic) in very, very ill persons in which regardless of what it has done the illness may remain acute sometimes for years and years.

Q. Is there any question in your mind that Alton Moore suffers from this mental disturbance?

A. No, there is not.

Q. Is there any question in your mind that Alton Moore has suffered from this mental disturbance for a period of time?

A. No, there is not.

Q. Would that include the period of time surrounding the events that he was accused of these crimes?

A. Certainly. Mr. Moore had been ill all his life. (R. 1472-1473).

Dr. Castiello then stated that the Defendant's illness could impair the Defendant's ability to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law. (R. 1472).

Dr. Reichenberg testified that the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law are substantially impaired due to his mental condition. (R. 1476).

There was sufficient unrefuted medical testimony for the Court to have found at least one statutory mitigating circumstance, to wit: That the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The failure of the trial court to make this finding was an abuse of discretion where the unrefuted medical testimony supported such a finding and where the State conceded same.

XI.

THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Appellant would respectfully stand by his Initial Brief on the above issue without waiving same.

XII.

THE DEFENDANT DID NOT RECEIVE A FAIR AND IMPARTIAL TRIAL DUE TO THE CUMULATIVE PREJUDICIAL EFFECT OF THE TOTALITY OF ERRORS COMPLAINED OF HEREIN.

The Appellant would respectfully stand by his Initial Brief on the above issue without waiving same.

CONCLUSION

Based upon the foregoing reasons and authorities, the judgment and sentence should be vacated and the cause remanded for a new trial. In the very least, the sentence of death should be vacated and the cause remanded for a resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant was mailed to Ralph Barreira, Esquire, Office of the Attorney General, 401 N. W. 2nd Avenue, Suite 820, Miami, Florida 33128, and to Alton Moore, #104659, Florida State Prison 11, P. O. Box 747, Starke, Florida 32091, P-1-S-10, this 31st day of JULY, 1987.

MAY L. CAIN