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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 69,838

PAUL CLAIR LENTZ,

Respondent.

______________________________/

PETITIONER'S REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

GARY L. PRINTY
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0290

COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner relies on the preliminary statement set forth in the Petitioner's Brief on the Merits.

SUMMARY OF ARGUMENT

ISSUE I

The alleged failure to instruct on insanity did not constitute fundamental err and this Court has denied post conviction relief to a capital defendant on this ground.

ISSUE II

The alleged improper comment was not a misstatement of the law and in any event Respondent did not object.

ISSUE III

The cumulative effect of the trial proceedings is that a man who planned a cold-blooded killing was properly convicted of attempted first degree murder after the victim survived and testified against him.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN GIVING THE STANDARD JURY INSTRUCTION ON INSANITY WHERE RESPONDENT DID NOT OBJECT TO THE INSTRUCTION GIVEN AND MADE NO REQUEST ORALLY OR IN WRITING FOR AN ALTERNATIVE INSTRUCTION.

Petitioner will rely on the arguments advanced in the Brief on the Merits and would only add that this Court has in effect affirmed the Fifth District Court of Appeal's holding in Lancia v. State, 11 F.L.W. 2536 (Fla. 5th DCA Dec. 4, 1986). In Martin v. Wainwright, 497 So.2d 872 (Fla. 1986), Martin argued, among other things, that "the jury instructions on sanity unconstitutionally shifted the burden of proof" and further argued that these claims were cognizable on habeas review by arguing that they involve fundamental error. Id., at 874.

This Court stated our review, however, discloses no error of fundamental nature, and we therefore find these points to have no merit. The Court then added in footnote 2 that:

> "This claim should have been raised, if at all, on appeal. Because the instructions were not objected at trial, however, the issue could not have been raised on appeal. Habeas is not a substitute for appeal. Thomas v. State, 486 So.2d 574 (Fla. 1986); Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986).

Id., at 874.

Respondent's argument that fundamental error occurred below is no more compelling than that in Mr. Martin's case.

ARGUMENT

ISSUE II

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL WHERE NO OBJECTION WAS MADE TO THE ALLEGED IMPROPER PROSECUTORIAL COMMENT.

Respondent's trial counsel did not object to the prosecutioner's comment on the judge's duty to assign the appropriate penalty. Appellant is bound by the acts of trial counsel. Castor v. State, 365 So.2d 701 (Fla. 1978).

Castor, supra, merely articulated the principle best stated in State v. Jones, 204 So.2d 515 (Fla. 1967). The requirement of a contemporaneous objection to prosecutorial comment eliminates the opportunity of the defense counsel to stand mute "knowing that a verdict against his client was thus tainted and could not stand". Id., at 518.

Moreover, the prosecutor's remark was that the Court would assign the appropriate penalty. The legislature has determined that the appropriate penalty for attempted first degree murder to be a minimum mandatory penalty of three years incarceration and reclassification of the offense by one degree. See Strickland v. State, 437 So.2d 150 (Fla. 1983). The statement of the prosecutor was not incorrect and cannot be considered fundamental error.

Lastly, the trial judge correctly refused to instruct on penalties.

The District Court below rejected this argument and stated the following:

> "Lentz argues first that he should have been granted a new trial based on the prosecutorial remark set forth above, which he alleges inferred that the jury could relax it's deliberations because Lentz could "get off" lightly if found guilty. See Pate v. State, 112 So.2d 380 (Fla. 1959). Alleged prosecutorial improprieties must be viewed in the context of the record as a whole to determine if they constitute sufficient prejudice to mandate a new trial. State v. Murray, 443 So.2d 955, 956 (Fla. 1984); Walker v. State, 483 So.2d 791 (Fla. 1st DCA 1986).
>
> A review of the record herein reveals that the contested remark was made in the context of urging the jury to consider only the evidence and not any sympathy they might feel for Lentz nor any possible penalty he might receive. The prosecutor did not state or imply that Lentz could "get off" with a light sentence so that the jury should not worry about finding him guilty. We affirm on this issue."

Lentz v. State, 498 So.2d 986, 987 (Fla. 1st DCA 1986).

See also California v. Brown, ____U.S.____, 40 CrL 3187 (January 27, 1987), approving an instruction cautioning the jury not to be swayed by sympathy and consider the record evidence in a capital sentencing context.

ARGUMENT

ISSUE III

RESPONDENT IS NOT ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE.

The overwhelming weight of the evidence in this trial reflects the fact that Respondent, in a cold and calculating fashion, purchased a handgun, practiced firing the gun to improve his aim, waited near the victim's home, deliberately parked his truck behind the victim's car to prevent his escape, calmly accosted the victim with the handgun concealed on his person, engaged the hammer and fired a round through the chest of the victim, struggled with the victim and then fired repeated rounds as he chased the victim. By his own admission, he did this because he was "pissed off" at the victim. Paul Lentz attempted to kill Charles Kelley in cold blood but for the grace of God, he failed. A man who had enjoyed business success and was obviously very intelligent, should, if anything, be held to a higher standard than the normal criminal lowlife which comes before this Court.

Mr. Lentz also claims that the trial court incorrectly allowed the prosecutor to cross examine him regarding the bugging device he installed on his office phone. This evidence was first admitted during cross examination of defense witness Dr. Sidney Merin who testified that Respondent tapped his wife's phone. (R-770-771). No objection was entered by Respondent.

The prosecutor later used this fact on cross examination of Mr. Lentz to show his jealous state of mind. (R-963). Mr. Padovano admitted that he was very ambivalent about it and told the trial judge "why don't we just go ahead and do it". (R-964).

The posture of this case is that Paul Lentz had a very experienced defense counsel who did not object to the prosecutor's alleged improper comment, he did not object to the insanity instruction or request another instruction, although he did request instruction on penalties and he agreed to let the phone tapping incident come in. Paul Lentz, an astute businessman, who made lists for everything, conceived a plan to avenge his wife's infidelity by ruining his business and killing her lover. Doctor David Moore, a defense witness, was incredible. He testified he relied exclusively on Appellant's statements without any corroborating investigation to form his opinion. (R-879).

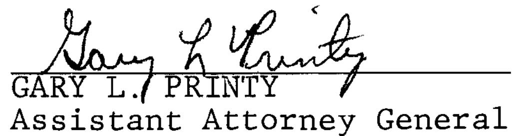
Moreover, Frank Kraeft, the man who sold the gun to Mr. Lentz and Charles Kelley, the victim, testified Respondent was calm and deliberate, not under any apparent stress, dressed well and clean shaven. (R-200). (R-563). This is clearly not a case involving a reversal in the interest of justice as argued by Respondent. The interest of justice reversal cited in Tibbs v. State, 397 So.2d 1120 (Fla. 1981), has no application here because this Court has already rejected the notion that the failure to instruct on insanity if fundamental.

CONCLUSION

Petitioner respectfully asks that this Court quash the decision of the District Court below and reinstate the judgment and sentence of Respondent.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



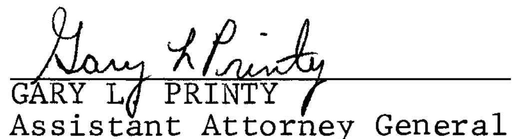
GARY L. PRINTY
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0290

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Ms. Glenna J. Reeves, Assistant Public Defender, Counsel for Respondent, this 6TH day of March, 1987.



GARY L. PRINTY
Assistant Attorney General

OF COUNSEL