IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 70,015

APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

BRIEF OF APPELLEE

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/sas

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PRELIMINARY STATEMENT

Appellee notes that appellant has another capital case pending before this Court in Case No. 70,245. Otherwise, KENNETH ALLEN STEWART will be referred to as the "Appellant" in this brief and the STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal will be referenced by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellee accepts the Statement of the Case and Facts as stated by appellant.

SUMMARY OF THE ARGUMENT

As to Issue I, appellant's waiver of his Fifth Amendment right to counsel is also a waiver of his Sixth Amendment right to counsel. Patterson v. Illinois, infra. Also, since appellant's grandparents consented to interception, then there is no basis to claim a violation by the state under §934.03, **Fla. Stat.**

As to Issue 11, appellant's convictions for escape and attempted escape supported the state's compelling interest to have appellant shackled. Moreover, since the use herein of leg shackles was unobtrusive, then appellant's claim of prejudice must fall on deaf ears. See Hildwin v. State, infra.

Appellant's contention as to Issue III is without merit. See Rhone v. State, infra.

Appellant's claim on Issue IV has already been decided by this Court in Arango v. State, infra.

As to Issue V, instructions on aggravating factors which the state conceded did not exist would lead to jury confusion and excessively vague sentencing considerations found abhorrent in Furman v. Georgia, infra. Cf. Maggard v. State, infra. Also, appellant's failure to object on the contention that the state established a non-statutory aggravating factor bars subsequent review of this issue on appeal.

The United States Supreme Court has already decided Issue VI adverse to appellant in California v. Ramos, infra.

As to Issue VII, since appellant did present this allegedly mitigating evidence before the jury, then he is now barred from

claiming prejudicial error. Also, the state's question to the mitigating witness "whether he knew of any other crimes committed by appellant" was proper to rebut the witness' assertion that appellant could become "an asset to the community." Moreover, apellant's failure to request curative instructions precludes error in denial of his motion for mistrial. See Mabery v. State, infra.

As to Issue VIII, appellant's failure to object bars subsequent review of this issue on appeal. Grossman v. State, infra.

As to Issue IX, the state contends that this case is distinguishable from Van Royal v. State, infra, because (1) the trial court made extensive findings on the record before he imposed death and, (2) the trial court's imposition of death followed the jury's ten-to-two recommendation of death.

As for the trial court's failure to provide written reasons in departing from the guidelines, the state asserts that any error here is harmless since the court could have departed upon the valid basis of appellant's capital convictions.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ALLOWING DETECTIVE LEASE TO TESTIFY TO THE CONTENTS OF A TELEPHONE CONVERSATION BETWEEN APPELLANT AND HIS GRANDMOTHER WHEREIN APPELLANT ADMITTED HIS GUILT TO THE CRIMES CHARGED?

Appellant contends that the trial court erred in failing to suppress his incriminating statements made during a telephone conversation which was intercepted in violation of the Fourth, Fifth, and Sixth Amendments along with Florida's Security of Communications Act.[1] The state disagrees.

On April 19, 1985, appellant was arrested and taken into custody on the instant offenses (R 335, 848). Later that day, he signed a "consent to interview" form, and was interviewed by Detectives Lease and Overton (R 390, 977). Other than acknowledging that he owned a .38 caliber Smith and Wesson revolver, appellant denied any knowledge of or complicity in the crimes charged (R 394-397).

On April 25, 1988, Detective Lease went to the home of the Berryhills as part of his investigation in this case (R 21). The Berryhills are appellant's grandparents (R 400). As Lease was about to knock on the door, he heard the telephone ring. Mr. Berryhill answered the phone and called for his wife. He noticed Lease and invited him in (R 21, 400-401). With his hand over the phone, Mr. Berryhill told the detective that his grandson was on

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1/ §934.03, Fla. Stat. (1985).

the phone. Lease asked if there was an extension, and if he could listen in (R 21, 401). Both grandparents gave their permission. A conversation between appellant and Mrs. Berryhill thereupon ensued.

Without any prompting from the detective, Mrs. Berryhill asked appellant if he had "[shot] that guy and girl?" Appellant replied in the affirmative, and when asked why, he stated "I guess to rob them." (R 402-403).

Note that Detective Lease testified to this conversation after Mrs. Berryhill stated on cross-examination that she [couldn't] remember exactly what [appellant] had said on the phone (R 384).

Prior to trial, appellant moved to suppress these statements on the bases that they were obtained in violation of both **§934.03, Fla, Stat. (1985),** and Miranda[2] (R 24-25). The trial court denied appellant's motion finding the statements to be "voluntary," and that there was no "custodial interrogation" nor any "expectation of privacy in that conversation" (R 30).

The state contends that the trial court's ruling was proper and that appellant's claim herein fails on several grounds.

First, appellant's conversation was intercepted after he waived his Fifth Amendment right to have counsel present during questioning. Second, even assuming that appellant's right to counsel had attached under the Sixth **Amendment,**[3] the state

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2/ Miranda v. Arizona, 384 U.S. 436, 99 S.Ct. 1277, 59 L.Ed.2d 492 (1966).

asserts that his waiver of counsel under the Fifth Amendment also constitutes a valid waiver of his right to counsel under the Sixth. See Patterson v. Illinois, 43 Crim.L.Rep. (BNA) 3147 (U.S. June 24, 1988). Third, the record belies appellant's contention that Mrs. Berryhill was a state agent; rather, it indicates that the incriminating statements were the result of luck and happenstance. Indeed, it was appellant who initiated the conversation, and it was Mrs. Berryhill who, without prompting, asked the questions. Therefore, it cannot be said that appellant's admissions were the product of a "stratagem deliberately designed to elicit an incriminating statement" see Muehlman v. State, 503 So.2d 310, 314 (Fla. 1987). Lastly, appellant's reliance upon Florida's Security of Communications Act is misplaced since §934.03(2)(c), Fla. Stat. (1985), permits a warrantless interception of oral communications where one of the parties to the communication has given consent to the interception and the purpose of the intercept is to obtain evidence of a criminal act.

Appellant's convictions must be affirmed.

3/ State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984).

ISSUE II

WHETHER THE TRIAL COURT ERRED BY FORCING APPELLANT TO STAND TRIAL IN SHACKLES WITHOUT FIRST CONDUCTING AN EVIDENTIARY HEARING OR CONSIDERING ALTERNATIVE SECURITY MEASURES?

Appellant contends denial of due process by his being compelled to stand trial in shackles; the state contends otherwise.

Although the Supreme Court has characterized shackling as an "inherently prejudicial practice," Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), shackling should be permitted when "justified by an essential state interest specific to each trial." 475 U.S. at 569, 106 S.Ct. at 1345, 89 L.Ed.2d at 534.

~~Sub~~ judice, appellant requested that his leg shackles be removed prior to trial. The trial court denied appellant's request saying, "[t]he Court has had problems with this particular defendant in the past, . . . there has been allegations he may attempt to run" (R 33).

After the state rested its case, defense counsel, claiming prejudice, moved for a mistrial on the shackling issue. Counsel also noted that he could see appellant's shackles from the jury box. The prosecutor disagreed saying that it would be almost impossible for the jury to see the shackles from there, and that appellant never walked in front of the jury (R 502). Appellant's motion was thereafter denied (R 503).

Appellant reiterated the shackles issue in his motion for new trial (R 798-803). The trial court denied appellant's motion stating:

THE COURT: The Court remembers the situation, obviously. The Court did, for the matter of record I want to put these statements on the record. I did consider the defendant a high risk for escape because of previous actions by the defendant.[4]

I also had been informed by bailiffs in my courtroom of just what Mr. James says, that in some manner this defendant has been able to slip the manacles that have been placed on him. I thought he was a large risk to the courtroom, a danger to the people in the courtroom, and this is why I ordered that he be required to wear the leg shackles during that trial.

I presume, and I am certain, because from where I sit on my bench I also can see under the open table, and I tried to make several observations during that trial. He had no prison garb on except, as you allege, that the manacles are prison garb, I mean, the shackles.

I observed and watched the situation on several occasions. The pants legs came over. I am sure if someone dwelled on that area of looking under the table, they could have seen it. If they were observable at all, in this Court, they were very unobtrusive.

As Mr. James has pointed out, he was not brought into the courtroom in the presence of the jury, to see the restricted walking that leg shacles cause, which would be an obvious error on the Court's part, I believe.

Under all of the circumstances I believe the Court did take the correct action. And for that and other reasons the Motion for New Trial is denied.

(R 803-804).

4/ In addition to being sentenced on the instant convictions, appellant was also sentenced on singular counts of escape and attempted escape (R 816).

The state asserts that shackling in this case was justified by its "essential interest" in maintaining safety in the courtroom. Indeed, the trial judge had within his personal knowledge the facts that appellant had pending against him two charges of first-degree murder, two charges of attempted first-degree murder, one charge of escape, one charge of attempted escape, and the fact that appellant had slipped his manacles while he was in the holding cell. These facts culminate in a reasonable probability that appellant would have attempted to flee if he was left unshackled.

As for the trial court's failure to hold a hearing or consider alternative security measures, the record reflects that appellant was dressed in a suit and long pants, he was sitting at a table, and he was never required to walk in front of the jury. And, any hearing with the jury would only call their attention to the matter that all parties tried to conceal. Moreover, this Court has held that [a] juror's catching [an] inadvertent sight of a defendant in handcuffs, chains, or other restraints is not so prejudicial as to require a new trial. See Hildwin v. State, No. 69,513 (Fla. Sept. 1, 1988).

As for considering less obtrusive alternatives, it must be noted that appellant never made any such request for these until after his motion for new trial; therefore, his request must be deemed waived. See Judges Fay, Tjoflat, Hill, and Edmondson's dissent in Elledge v. Dugger, 833 F.2d 250 (11th Cir. 1987).

Appellant's convictions must be affirmed.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S OBJECTION TO BAILIFF MARONE'S TESTIFYING AS A PROSECUTION WITNESS IN PENALTY PHASE?

Appellant's contention here is without merit.

Sub judice, the state called only two witnesses in penalty phase. The first was a depty clerk who identified certified copies of judgments entered against appellant for attempted first-degree murder, attempted armed robbery and aggravated assault (R **626).** The second, Bailiff Marone, identified appellant as the person whose fingerprints appeared at the bottom of the judgments (R **628).** The judgments were offered to prove that appellant had previously been convicted of felonies involving the use or threat of violence to the person pursuant to **§921.141(5)(b), Fla. Stat. (1985).**

In Rhone v. State, **93** So.2d **80** (Fla. 1957), this Court held,

> that the mere fact that an officer has a jury in charge, without more, does not disqualify him from being a witness in the case, and whether or not such procedure will constitute reversible error depends upon the facts and circumstances disclosed by the record.

Id. at 81.

In Rhone, as in the present case, the bailiff was not a material witness and his testimony was not harmful; hence, appellant's failure to demonstrate prejudice precludes this Court from entertaining this issue on appeal. See also Moseley v. State, **60** So.2d **167** (Fla. **1952).**

Appellant's sentence must be affirmed.

ISSUE IV

WHETHER THE JURY INSTRUCTIONS GIVEN IN PENALTY PHASE CONSTITUTED AN IMPERMISSIBLE SHIFT IN THE CONSTITUTIONALLY PRESCRIBED BURDEN OF PROOF?

This Court has previously heard and found unavailing this argument in Arango v. State, 411 So.2d 172 (Fla. 1982), and Francois v. State, 423 So.2d 357 (Fla. 1982). Appellant, however, asks this Court to revisit this issue in light of Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). Appellant's invitation should be declined.

The jury in Jackson was instructed:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.

Id. at 1473. In reversing, the Eleventh Circuit held that the jury was erroneously instructed that death was presumed to be the appropriate penalty. Jackson, however, is distinguishable from the instant case.

Sub judice, the jury was instructed to consider "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (R 623, 747, 748). Nowhere in these instructions is a presumption that death is appropriate. The standard directions given to a Florida jury on balancing the aggravating and mitigating circumstances has been approved by the Supreme Court in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), as comporting with the

requirements of due process. Appellant's sentence must therefore be affirmed.

ISSUE V

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY ON ALL THE STATUTORY AGGRAVATING CIRCUMSTANCES, IN INSTRUCTING THE JURY THAT ALL THE AGGRAVATING CIRCUMSTANCES OFFERED WERE ESTABLISHED, AND IN INSTRUCTING THE JURY TO CONSIDER A NON-VIOLENT FELONY CONVICTION AS AN AGGRAVATING FACTOR?

Appellant predicates error here on several points. First, he contends that if the jury was instructed on all the aggravating factors, then he could have argued the absence of any aggravating factors as a mitigating factor. Second, appellant contends that the trial court's leaving out the words "any of" from the standard jury instructions erroneously changed the instructions into a judicial direction that the aggravating factors had indeed been proved. And third, the jury was erroneously instructed to weigh appellant's conviction for second-degree arson as a prior conviction of a violent felony to the person under §921.141(5)(b), Fla. Stat. (1985). The state disagrees with appellant on all points.

As to point one, the Florida Standard Jury Instructions[5] require the judge to give instructions only on those aggravating circumstances for which evidence has been presented. The rationale for this seems obvious since instruction on an irrelevant aggravating factor lends itself to excessively vague sentencing considerations found abhorrent in Furman.[6] Furthermore, this

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5/ Fla. Std. Jury Instr. (Crim.) §921.141(5), p.78.

6/ Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Court held in Maqqard v. State, 399 So.2d 973 (Fla. 1981), that it was reversible error to allow the state to present evidence against the defendant to rebut a mitigating circumstance that the defendant expressly conceded did not exist; therefore, it would also be prejudicial and confusing to allow the defendant to present rebuttal evidence on aggravating factors that the state concedes does not exist. Lastly, any claim that the jury could be misled by an instruction that there are only two statutory aggravating circumstances and that the two fortuitously apply to appellant cannot be persuasive since appellant had the opportunity to clear up any misconception in closing argument.

As to the second and third points, the state contends that appellant's failure to object below bars him from raising these points for review on appeal. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982). If, however, this Court finds any error to be present, then the state asserts that such error must be deemed harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Appellant's sentence must be affirmed.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED PENALTY PHASE INSTRUCTION THAT THE ALTERNATIVE SENTENCE TO DEATH WAS LIFE IMPRISONMENT WITH THE POSSIBILITY THAT HE MAY NEVER BE PAROLED?

Appellant contends that the trial court erred in failing to instruct the jury that if given life, he would probably never be paroled. Appellant's contention is unavailing.

Sub judice, the jury was instructed in penalty phase that punishment for [the] crime [of first-degree murder] is either death or life imprisonment without the possibility of parole for twenty-five years (R **622, 746, 748, 751).** Prior thereto, defense counsel asked the trial court to modify these instructions by saying that appellant would probably never be paroled with the abolition of the Parole and Probation Commission (R **616, 618).** The trial court denied appellant's request stating that his charge was the correct statement of the law (R **618).** The trial court's ruling was proper.

In California v. Ramos, **463** U.S. 992, **103** S.Ct. **3446, 77** L.Ed.2d **1171 (1983),** the Supreme Court found unpersuasive an almost identical argument presented by a capital defendant. In Ramos, the trial judge gave the jury an additional instruction during penalty phase that a sentence of life without the possibility of parole could be commuted by the governor to a sentence of life with the possibility of parole. This instruction (the "Briggs Instruction") was incorporated into the California Penal Code as a result of voter initiative and was required to be given

during the penalty phase of a capital case by the California legislature.

In holding against Ramos, the Supreme Court stated that the Briggs Instruction properly "invites the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society." **463** U.S. at **1003.** The instruction **also** individualizes the jury's deliberation by not predicting "so much what some future governor might do, but more what the defendant himself might do if released into society." **463** U.S. at **1005.** Lastly, the instruction is "merely an accurate statement of a potential sentencing alternative" under California law. **463 U.S.** at **1009.**

Since the Briggs Instruction is almost identical to that given ~~sub~~ judice, then the holding in Ramos mandates that appellant's sentence be affirmed.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN EXCLUDING MITIGATING EVIDENCE AND IN ALLOWING THE STATE TO ESTABLISH A NON-STATUTORY AGGRAVATING CIRCUMSTANCE THROUGH CROSS-EXAMINATION?

During the penalty phase of the trial sub judice, appellant called his stepfather, Bruce Scarpo, as a mitigation witness. Scarpo testified that when appellant was a young child, his mother took him and ran off with a man who "robbed 7-Eleven stores for a living" (R **637-638).** Scarpo further testified that after appellant was returned to him, appellant "would talk about . . . what this man had done to him; made him stand in the corner for five, six hours at a time" (R **641).** The state objected on the basis of hearsay (R **641).** Appellant countered saying that the statement was reliable and that it was mitigation. The trial court sustained the objection stating that those statements could not be cross-examined (R 642), and that appellant was able to take the stand and relay these events (R **644).**

Scarpo went on to testify that when appellant did something mischievous, he would ask the witness, "Are you going to make me stand in the corner?" "Are you going to beat my back?" (R **644).**

Appellant contends that the trial court erroneously excluded potentially mitigating evidence from his sentencing hearing in violation of due process; the state contends otherwise.

First, if the trial court were to allow this testimony, the state would have been denied "a fair opportunity to rebut these hearsay statments." Second, the trial court properly ruled that

if appellant wanted to present this evidence, he could have taken the stand. See McGautha v. California, 402 U.S. 183, 217, 91 S.Ct. 1454, __, 28 L.Ed.2d 711, 732 (1971). Third, if the trial court did err, such error must be deemed harmless since Scarpo did testify to the very things that the state sought to exclude; therefore, the jury did have the benefit of this allegedly mitigating evidence.

Appellant, citing Robinson v. State, 487 So.2d 1040 (Fla. 1986), further contends that the trial court erred in denying his motion for mistrial on the ground that the state was allowed to introduce the non-statutory aggravating factor of prior convictions of non-violent felonies. The facts in Robinson, however, are distinguishable from those sub judice.

On cross-examiantion of Mr. Scarpo, the prosecutor inquired whether the witness knew "any of the facts and circumstances surrounding" appellant's previous convictions on June 9th for attempted first-degree murder, attempted robbery and aggravated assault (R 668). The witness replied in the negative, and the prosecutor went on to ask whether Scarpo was aware that other than being convicted of the instant first-degree murder, appellant was also convicted of attempted second-degree murder, armed robbery and arson (R 669). The witness again replied in the negative. The prosecutor then asked if the witness knew "whether or not Stewart [had] been convicted of any other offenses?" The witness said yes, and the prosecutor asked "how many times?" Defense counsel interposed an objection and moved for a mistrial on the

basis that the question was "not proper for the aggravating circumstances" (R 669). The trial court denied appellant's motion for mistrial, but cautioned the prosecutor not to touch on that subject again (R 670).

The state asserts that the trial court properly denied appellant's motion for mistrial because his failure to move for a curative instruction bars the remedy of mistrial. Mabery v. State, 303 So.2d 369, 370 (Fla. 3d DCA 1974). Also, the state should have been allowed to rebut the witness' assertion that appellant could become "an asset to the community" by evidence of previous crimes for which he had been convicted. Cf. Hildwin v. State, 13 F.L.W. 528, 529 (Fla. Sept. 1, 1988).

Appellant's reliance herein on Robinson v. State, 487 So.2d 1040 (Fla. 1986), is misplaced. In Robinson, the prosecutor asked whether the witnesses offered in mitigation were "aware . . . the defendant went back to jail and committed yet another rape?" This Court reversed stating that the crimes mentioned by the state "occurred after [the] murder and that Robinson had not even been charged with, let alone convicted of." Id. at 1042. Sub judice, the nature of the crimes suggested by the prosecutor was never revealed. Moreovoer, the prosecutor was abruptly stopped from inquiring further along those lines; thus, if error is found herein, it must be deemed harmless.

Appellant's sentence must be affirmed.

ISSUE VIII

WHETHER APPELLANT'S SENTENCE MUST BE REVERSED ON THE BASIS OF BOOTH V. MARYLAND?

Appellant's contention here is unavailing.

First, appellant's failure to object bars subsequent appellate review of this issue. Grossman v. State, 525 So.2d 833, 842 (Fla. 1988). Second, the fact that it was the trial judge — and not the jury — who heard the victim's father testify renders any such error harmless since judges are presumed to ignore irrelevant material and follow their own instructions. See Ford v. Strickland, 696 F.2d 804, 811 (11th Cir. 1983).

ISSUE IX

WHETHER APPELLANT S SENTENCE OF DEATH MUST BE VACATED BECAUSE THE TRIAL COURT FAILED TO SUBMIT WRITTEN FINDINGS IN SUPPORT OF DEATH AS REQUIRED BY **SECTION 921.141(3), FLORIDA STATUTES (1985),** AND WHETHER THE SENTENCES IMPOSED ON THE NON-CAPITAL OFFENSES MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO SUBMIT REASONS FOR DEPARTING?

Appellant, citing Van Royal v. State, 497 So.2d 265 (Fla. 1986), contends that his sentence of death must be vacated because the trial court failed to submit written findings as required by **§921.141(3), Fla. Stat. (1985).** The state recognizes the holding in Van Royal, but contends that the distinguishing factors in this case justify affirmance of the sentence of death.

In Van Royal, the trial judge's written findings overrode the jury's recommendation of life, followed sentencing by over six months, and were filed only after the record had been filed in this Court. In reversing Van Royal's sentence, this Court stated "[we] cannot assure [ourselves] that the trial judge based the oral sentence [of death] on a well-reasoned application of the factors set out in **§921.141(5)** and **(6),** and in Tedder v. State,[7] and find the death sentences in the case unsupported." 497 So.2d at 628.

The distinguishing factors sub judice are that the trial judge's imposition of death came after he orally made his findings on the record as to the aggravating and mitigating circum-

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7/ 322 So.2d 908 (Fla. 1975).

stances (R 834-837), and that the sentence imposed followed the jury's ten-to-two recommendation of death (R 837). See Muehleman v. State, 503 So.2d 310, 317 (Fla. 1987).

The trial judge's oral findings were based on a well-reasoned application of both the aggravating and mitigating circumstances in this case and are totally supported by the record; hence, appellant's sentence of death must be affirmed.

Should this Court be inclined to reverse, the state then asks that jurisdiction be relinquished to the trial court so as to allow submission of written findings in support of death.

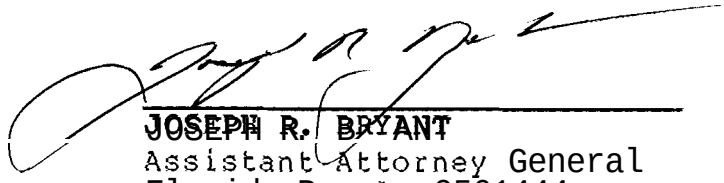
As for the trial judge's failure to provide written reasons for departing from the recommended range of the sentencing guidelines on the non-capital offenses, the state recognizes this Court's holding in Jackson v. State, 478 So.2d 1054 (Fla. 1985), but contends that the lower court's failure to include written reasons herein is harmless because the court could have validly departed on the basis of appellant's capital convictions. See Smith v. State, 454 So.2d 90 (Fla. 2d DCA 1984).

CONCLUSION

Based on the foregoing arguments and citations of authority, the judgments and sentences should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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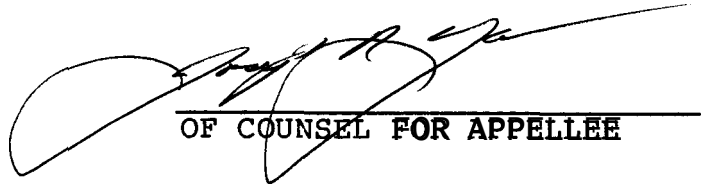
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Douglas S. Connor, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000-Drawer PD, Bartow, Florida 33830, this 15th day of September, 1988.



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