IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART, :

Appellant, :

vs. : Case No. 70,015

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
BAR NO. 0143265

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STATEMENT OF THE CASE

Appellant, Kenneth Allen Stewart, 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

Appellant's waiver of rights on April 19, when he was arrested was not still in effect on April 25 when his telephone conversation was intercepted. In the meantime, on April 23, Stewart had a first appearance hearing where counsel was appointed. Also, when Stewart made incriminating statements on the telephone, he was unaware that he was being interrogated by a State agent or that Detective Lease was listening in. Had Miranda warnings been read to Stewart during the telephone conversation, Appellee's argument might have more merit.

Although the trial judge may have had reason to consider Stewart an escape risk, Stewart should have been given an opportunity prior to trial to contest the necessity for shackling. Appellee's reliance on a decision where a juror inadvertently caught sight of the defendant in restraints outside of the courtroom is misplaced. Courtroom shackling is much more prejudicial. Also the jury's opportunity to view Stewart in shackles was anything but inadvertent.

ARGUMENTS

ISSUE I

THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS INCRIMINATING STATEMENTS MADE BY STEWART DURING A TELEPHONE CONVERSATION WITH HIS GRANDMOTHER WHICH DETECTIVE LEASE INTERCEPTED.

In his brief, Appellee urges this Court to find that Stewart had waived any right to counsel when he responded to his grandmother's questioning on the telephone. The State relies upon Stewart's consent to be interviewed by Detectives Lease and Overton on April 19, 1985 subsequent to his arrest (R390-4, 977). It is undisputed that during this interview, Stewart completely denied any involvement in the incident and claimed that he had been home at the time (R394-6, Brief of Appellee p. 5). The State argues that this waiver of Miranda rights was still effective six days later on April 25, 1985 when Detective Lease listened in on Stewart's telephone conversation with his grandmother.

In order to accept Appellee's contention, it would be necessary to hold that once a criminal defendant waives his constitutional rights after Miranda warnings, these rights disappear forever. Moreover, the State ignores the fact that Stewart had a first appearance hearing on April 23, 1985 (R1330). Appellee makes no claim that Stewart waived his right to have counsel appointed at this hearing. Consequently, it appears that Stewart was represented by counsel at the time of the intercepted telephone conversation.

The State's contention that Patterson v. Illinois, 487 U.S. ____, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) supports its position might have some merit if either Detective Lease or Estelle Berryhill had read Miranda warnings to Stewart when he telephoned. Since they failed to do this, Stewart was never made aware of his right to have counsel present when he was questioned about the shootings. Appellee has failed to carry his burden to show a waiver of counsel during the questioning. Cf. Brewer v. Williams, 430 U.S. 387 (1977).

Finally, the State relies upon this Court's decision in Muehleman v. State, 503 So.2d 310 (Fla. 1987) and asserts that Stewart's incriminating statements were not the "product of a 'stratagem deliberately designed to elicit an incriminating statement"'. Brief of Appellee p. 7; Muehleman at 314. The facts at bar, however, are readily distinguishable from those in Muehleman.

In Muehleman, the informant approached the authorities on his own initiative after the defendant repeatedly tried to discuss details of the crime. The informant was instructed not to initiate conversation with Muehleman. Use of a tape recorder in itself was held insufficient to establish a constitutional violation because it did not prove that the defendant's incriminating statements were deliberately elicited.

By contrast, in the case at bar the idea of intercepting Stewart's conversation on the extension telephone originated with Detective Lease (R23). Mrs. Berryhill was not a passive

listener; she directly asked Stewart whether he shot "that guy and the girl" and why (R23, 402-3). It does not matter that Mrs. Berryhill asked these questions without prompting; it is enough that Stewart was unaware that he was being interrogated by an agent for the State. This surreptitious State action is of the same caliber as that found reversible error by this Court in Malone v. State, 390 So.2d 338 (Fla. 1980) and the United States Supreme Court in Massiah v. United States, 377 U.S. 201 (1964).

ISSUE II

THE TRIAL COURT ERRED BY FORCING STEWART TO STAND TRIAL IN SHACKLES WITHOUT CONDUCTING AN EVIDENTIARY HEARING OR CONSIDERING ALTERNATIVE SECURITY MEASURES.

In his brief, Appellee quotes the post-trial comments of the trial judge in justification of Stewart's shackling (Brief of Appellee p. 9, R803-4). The trial judge indicated that he considered Stewart an escape risk (R803). While the shackles could be seen if someone looked under the counsel table, in the judge's opinion they were "unobtrusive" (R804).

These comments at the hearing on Stewart's Motion for New Trial fail to explain why the court did not allow Stewart an opportunity to contest the need for shackles prior to trial. The record shows that Stewart asked that the shackles be removed (R33). When the assistant state attorney suggested that there would be less attention drawn to the shackles if the defendant remained seated, the trial judge showed his impatience by

insisting that Stewart would stand (R33). The court remarked, "if they are going to see them, they are going to see them" (R34).

Under these circumstances, any request for less obtrusive alternatives by defense counsel would have been futile. The trial judge had clearly committed himself to trying Stewart in shackles and didn't care what the jury saw.

Appellee's reliance on Hildwin v. State, Case No. 69,513 (Fla. September 1, 1988) [13 FLW 528] is misplaced. In Hildwin, one juror arrived early at the courthouse and saw the defendant being transported from the jail. This encounter was totally inadvertent. Moreover, there was much less prejudice because the public is generally aware that prisoners are handcuffed (or otherwise restrained) while being transported. The public is also aware that defendants are not restrained in the courtroom unless there is a good reason.

In the case at bar, exposing Stewart to the jury while he was in shackles was planned, not inadvertent. Although the trial judge was apprised that the defense considered shackling prejudicial, he failed to take any step to block the jury's view of the shackles or consider alternatives. Evidently at some point after this trial the judge reconsidered his position because the next time Stewart was tried he was not shackled (R800, 803).

ISSUE III — THE TRIAL JUDGE ERRED BY OVERRULING APPELLANT'S OBJECTION TO THE BAILIFF, DEPUTY MORONE, TESTIFYING AS A PROSECUTION WITNESS IN PENALTY PHASE.

ISSUE IV	THE TRIAL JUDGE ERRED BY REFUSING TO GIVE DEFENSE REQUESTED SPECIAL PENALTY PHASE INSTRUCTION NUMBER ONE BECAUSE THE STANDARD JURY INSTRUCTIONS ARE OTHERWISE SUBJECT TO INTERPRETATION IN AN UNCONSTI-TUTIONAL MANNER.
ISSUE V	THE JURY WAS IMPROPERLY INSTRUCTED BECAUSE DEFENSE COUNSEL'S REQUEST FOR INSTRUCTION ON ALL OF THE AGGRA-VATING CIRCUMSTANCES WAS DENIED; THE JURY WAS TOLD THAT AGGRAVATING CIR-CUMSTANCES WERE ESTABLISHED; AND THE JURY WAS INSTRUCTED TO WEIGH A NON-VIOLENT FELONY CONVICTION.
ISSUE VI	THE TRIAL COURT ERRED BY FAILING TO MODIFY THE PENALTY INSTRUCTION AS REQUESTED TO INFORM THE JURY THAT STEWART WOULD NOT NECESSARILY BE ELIGIBLE FOR PAROLE IN TWENTY-FIVE YEARS IF A LIFE SENTENCE WERE IMPOSED.
ISSUE VII	THE TRIAL COURT ERRED BY EXCLUDING RELEVANT EVIDENCE IN MITIGATION AND ALLOWING STATE CROSS-EXAMINATION TO ESTABLISH A NON-STATUTORY AGGRAVATING CIRCUMSTANCE.
ISSUE VIII	THE SENTENCE OF DEATH WAS IMPOSED IN VIOLATION OF THE EIGHTH AMENDMENT, UNITED STATES CONSTITUTION BECAUSE THE SENTENCING JUDGE HEARD TESTIMONY FROM THE VICTIM'S FATHER DESCRIBING THE CHARACTER OF THE VICTIM AND URGING A SENTENCE OF DEATH.
ISSUE IX	THE SENTENCE OF DEATH MUST BE VACATED BECAUSE THE SENTENCING JUDGE FAILED TO PREPARE WRITTEN FINDINGS AS REQUIRED. ALSO, HE FAILED TO PREPARE WRITTEN REASONS FOR DEPARTURE FROM THE SENTENC-ING GUIDELINES WHEN IMPOSING SENTENCE ON THE NON-CAPITAL FELONIES.

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

CONCLUSION

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

Respectfully submitted,

JAMES MARION MOORMAN
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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 on this 20th of October, 1988.

Douglas S. Connor
DOUGLAS S. CONNOR