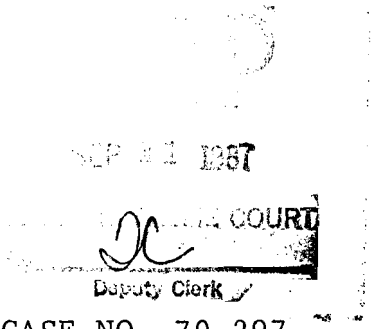
IN THE FLORIDA SUPREME COURT



CARLA CAILLIER,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 70,297
	)	
	)	
THE STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

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

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This is a direct appeal from a judgment for first-degree murder and sentence of death entered by the Circuit Court, Hillsborough County, Florida. In this brief, the parties will be referred to by their proper names or as they stand before this Court. The letter "R" will be used to designate a reference to the record on appeal. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellee accepts the Statement of the Case and Facts presented in the Brief of the Appellant, but specifically invites the Court's attention to the following.

The evidence supporting conviction established that it was Appellant who first brought up the subject of killing her husband. (R. 232, 234-235). Appellant told Payne she had paid a man $500 to kill her husband, but that the man ran off with the money and did not do the job. (R. 235). Appellant asked Payne to kill her husband and said if he would not, she would have to do it herself. (R. 235-236). Payne refused. (R. 236). Approximately one week before Louis Caillier was killed, Appellant again discussed her plan with Payne. She said she did not want a divorce because she did not want to lose custody of her child. (R. 237). Appellant also told Payne she was the sole beneficiary

of a $100,000 life insurance policy and that in addition there was $25,000 in the bank. (R. 238).

The plan was for Appellant and Payne to wait till things "cooled down" after the killing of Caillier, and then to use the insurance money to live on and to eventually get married. (R. 238). On November 18, 1986, Appellant went with Payne and her son to a pawn shop to purchase a gun to be used in killing Appellant's husband. (R. 239). Appellant tried a couple of guns. Appellant paid for the gun. (R. 241). Payne told Appellant he would assist her by doing the actual killing himself. (R. 241). Appellant took Payne to a bus station, purchased a ticket for Payne to go to Tampa to kill her husband and put Payne on the bus. (R. 246-247).

Payne testified that Appellant told him how to go about killing her husband. Appellant told Payne to go to her husband's house and say he was looking for work and that he had heard L.J. was hiring. (R. 248). Appellant gave Payne a photograph of her husband so Payne would recognize him. (R. 249). Payne did not know Appellant's husband, had never seen or met him, and had nothing against him. Appellant also told Payne where her husband worked and the address where he lived. (R. 247, 249).

After Payne killed Caillier, he was to call Appellant to let her know it was done. Payne did that. (R. 255). Payne then flew back to Louisiana with a plane ticket paid for by Appellant. (R. 254-255).

Appellant's participation in this scheme is further supported by the testimony of Murray Campbell. One month before the killing of Caillier, Appellant approached Campbell and asked him if he knew anyone who could kill her husband for $10,000. (R. 218-219). Campbell did not think she was serious, but after he learned of the killing a month later, he went to police with his story. (R. 219-220).

SUMMARY OF THE ARGUMENT

Although relative culpability of an accomplice and disparity of the sentence received by an accomplice may be considered in sentencing, the evidence here clearly establishes that Appellant's culpability and participation in the murder of her husband far exceeds that of her co-felon, the actual triggerman. Accordingly, the disparate treatment of Appellant's co-felon was not a factor requiring the Court to follow the jury's recommended sentence.

The only mitigating circumstance established by the evidence is Appellant's lack of prior criminal activity. This factor is so insignificant when considered in conjunction with the aggravating circumstances and the evidence of Appellant's guilt that no reasonable person could differ as to the propriety

of the death sentence. Because there is no reasonable basis for the jury's recommendation of life imprisonment, the judgment and sentence of death should be affirmed.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT.

Appellant contends that the trial court erred in sentencing her to death for the murder of her husband, Louis Caillier, when the jury recommended a sentence of life imprisonment. Appellant relies upon Tedder v. State, 322 So.2d 908 (Fla. 1975) in which this Court stated:

> "A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."
>
> 322 So.2d at 910.

Appellant argues that the jury's recommendation here was reasonable because Appellant was not the triggerman and because her participation in the crime was minor.

The trial court considered the recommendation and specifically concluded that the Tedder standard was met. (R. 552-553).

Under §921.141(2), Fla. Stat., the jury's recommendation is not binding, but advisory only. The final sentencing authority lies with the judge rather than the jury.

Appellant argues that the degree of participation of State witness Ty Payne in the murder and the fact that Payne received a life sentence in contrast to Appellant's sentence of death are factors in mitigation which compelled the trial court to follow the jury's recommendation.

This Court has held that it is permissible for different sentences to be imposed on capital co-defendants whose culpability differs in degrees. See, Williamson v. State, No. 68,800 (Fla. July 16, 1987)[12 FLW 422]; Hoffman v. State, 474 So.2d 1178 (Fla. 1985). The Court has also held that the relative culpability of an accomplice or joint perpetrator, together with any disparity of treatment received by such accomplice as compared with that of the capital offender being sentenced, are appropriate factors which may be taken into consideration in the sentencing decision. See, Craig v. State, No. 62,184 (Fla. May 28, 1987)[12 FLW 269]; Malloy v. State, 382 So.2d 1190 (Fla. 1979); Smith v. State, 365 So.2d 704 (Fla. 1978).

In Malloy, supra, this Court found that the jury could have believed that, although guilty of murder along with his co-defendants,

Malloy was not the "triggerman". The co-defendants received prison terms of five to ten years. The Court concluded that these facts formed a reasonable basis for the jury's life recommendation.

In Craig v. State, supra, however, this Court distinguished Malloy. In Craig, the Appellant was found guilty on the basis of the testimony of his co-perpetrator, Robert Schmidt, of the first-degree murders of Walton Farmer and John Eubanks. In exchange for his testimony, Schmidt pled guilty and received life sentences. Against Craig, the jury recommended a sentence of death for the murder of Farmer and a sentence of life imprisonment for the murder of Eubanks. The Court imposed sentences of death for both murders by Craig. On appeal, Craig argued that the jury override on the murder of Eubanks was inappropriate in light of the life sentence received by Schmidt. This Court emphasized that the evidence established that Craig was not secondarily responsibile for the murder of Eubanks, but was, in fact, the instigator and the planner of both murders. The Court concluded:

> The fact that appellant was the prime mover with regard to the murder of Eubanks distinguishes this case from Malloy. Thus we conclude that the disparate treatment of Schmidt was not a factor that required the court to follow the jury's recommended sentence for the murder of Eubanks.
>
> 12 FLW 275.

Similarly, in Engle v. State, No. 68,548 (Fla. June 25, 1987)[12 FLW 314], this Court reasoned that the evidence established that Engle's culpability did not compel the trial court to accept the jury's recommendation of a life sentence.

In DuBoise v. State, No. 67,082 (Fla. February 19, 1987) [12 FLW 107], this Court clearly stated that:

> One of the factors upon which a jury can reasonably base a recommendation of life imprisonment is the disparate treatment of others who are equally or more culpable in the murder.
>
> (emphasis added); 12 FLW at 109; see also, Brookings v. State, 495 So.2d 135 (Fla. 1986).

Thus, where the co-perpetrator is not equally or more culpable than the defendant being sentenced, the sentence of the co-perpetrator is irrelevant. Cf., Rogers v. State, No. 66,356 (Fla. July 9, 1987)[12 FLW 368] (Accomplice's sentence irrelevant where evidence shows accused perpetuated murder without aid or counsel from accomplice).

In the case sub judice, the evidence so overwhelmingly establishes that Appellant was the instigator, planner, and moving force behind the murder of Louis Caillier that the culpability of Ty Payne could not reasonably be found to be

greater than or even equal to that of Appellant. Accordingly, the sentence received by Payne does not constitute a mitigating factor which could reasonably be considered by the jury. Craig, supra; Engle, supra.

More specifically, the evidence supporting conviction established that it was Appellant who first brought up the subject of killing her husband. (R. 232, 234-235). Appellant told Payne she had paid a man $500 to kill her husband, but that the man ran off with the money and did not do the job. (R. 235). Appellant asked Payne to kill her husband and said if he would not, she would have to do it herself. (R. 235-236). Payne refused. (R. 236). Approximately one week before Louis Caillier was killed, Appellant again discussed her plan with Payne. She said she did not want a divorce because she did not want to lose custody of her child. (R. 237). Appellant also told Payne she was the sole beneficiary of a $100,000 life insurance policy and that in addition, there was $25,000 in the bank. (R. 238).

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if he knew anyone who could kill her husband for $10,000. (R. 218-219). Campbell did not think she was serious, but after he learned of the killing a month later, he went to police with his story. (R. 219-220).

This evidence which was the basis for the jury's verdict of guilty in the guilt phase of the trial overwhelmingly establishes that Appellant's participation in this murder far exceeded that of Ty Payne even though Payne was the actual triggerman. Given that Appellant is guilty, for purposes of the penalty phase of the trial, it is clear that no reasonable jury could find her complicity in this offense any less crucial than Payne's act of pulling the trigger. Indeed, if Payne had been tried for capital felony in the murder of Caillier, the evidence would have supported a finding in mitigation that he acted under the domination of Appellant. See, Craig, 12 FLW at 275. The fact that Appellant was the prime mover in the murder of her husband distinguishes this case from Malloy, Brookings and DuBoise. Accordingly, the disparate treatment of Payne is not a factor that required the trial court to follow the jury's recommended sentence. Craig, 12 FLW at 275.

No other mitigating evidence was presented at the penalty phase of the trial. The witnesses presented did not offer testimony relevant to mitigation, but reiterated their belief in Appellant's innocence. (R. 425-480). This was not relevant to the penalty phase of the trial. The only mitigating

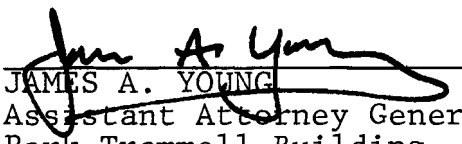
circumstance established was Appellant's lack of prior criminal activity. This factor, considered in conjunction with the enormity of the evidence against Appellant regarding both Appellant's guilt and the circumstances in aggravation, cannot reasonably support a jury's recommendation of a life sentence. As in Engle, death is clearly the appropriate sentence. There is no reasonable basis for the jury's recommendation of life imprisonment. Accordingly, the judgment and sentence of death should be affirmed.

CONCLUSION

WHEREFORE, based on the foregoing reasons, arguments and authorities, the Appellee would urge this Honorable Court to render an opinion affirming the judgment and sentence of the trial court.

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. Regular Mail to MICHAEL A. HANSON, ESQUIRE, 5803 North Florida Avenue, Tampa, Florida 33604 on this 9th day of September, 1987.

Of Counsel for Appellee