

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,333

HORACE BROWN

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

FILED
SID J. WHITE

MAY 7 1987

CLERK, SUPREME COURT

By _____
Deputy Clerk

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ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Petitioner was the appellant/cross-appellee below. The respondent was the appellee/cross-appellant below. References to the appendix will be made by the letter "A".

STATEMENT OF THE CASE AND FACTS

Respondent does not entirely agree with petitioner's version of this case. Consider the following:

Petitioner was charged with first degree murder in the trial court. He was found guilty. At the close of the guilt phase of the trial petitioner moved that the trial judge rule the death penalty inapplicable. That motion was granted, and no penalty phase was ever held. Petitioner was sentenced to life in prison.

Petitioner appealed his conviction to the Third District Court of Appeal. Respondent filed a cross-appeal on the trial judge's failure to celebrate a penalty phase.

The Third District affirmed the conviction and reversed with instructions to conduct a penalty phase. It held that Enmund v. Florida, 458 U.S. 782 (1982) was inapplicable to the facts of this case, and that the trial court was not justified in cutting off the trial as it did.

Petitioner has moved to invoke this Court's discretionary jurisdiction.

QUESTION PRESENTED

WHETHER THE DECISION OF THE THIRD
DISTRICT COURT OF APPEAL IN THIS CASE
CONFLICTS WITH ANY DECISIONS OF THIS
COURT?

SUMMARY OF ARGUMENT

Respondent's position in this case is that under Florida's capital sentencing scheme, a trial court is obligated to conduct a penalty phase. Unless and until that happens any sentence which emerges from the trial is an unlawful, void sentence. Double jeopardy principles do not apply when an appellate court vacates a void sentence and remands for further proceedings designed to produce a valid sentence.

It should also be pointed out that petitioner has not been re-sentenced. For that reason this case is not ripe for review.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT.

Capital cases are made up of three stages: the guilt phase, the penalty phase before the jury, and the sentencing hearing. Engle v. State, 438 So.2d 803 (Fla. 1983).

The trial court is required by statute to go on to the penalty and sentencing phases once a conviction has been returned. F.S. §921.141 (1). This is mandatory.

The trial court in this case simply refused to follow the dictates of the capital punishment statute. He determined (incorrectly) that the death penalty was inapplicable and summarily sentenced petitioner to life in prison. No penalty phase was ever held. Petitioner did not even move to waive jury for the penalty phase. This was error, as the Third District held. A valid life sentence in a capital case must follow the celebration of the penalty phase of the trial, not precede it. State v. Dixon, 283 So.2d 1 (1973).

Petitioner's assertion that Double Jeopardy would preclude the imposition of a death sentence is incorrect. North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed.2d 656, 89

S.Ct. 2072 (1969) held that a more severe sentence may be handed down when the trial court is subsequently apprised of new information concerning the defendant's case. That is exactly the purpose of the penalty phase--to inform the court of the appropriateness of the death penalty in light of certain aggravating factors not relevant to the guilt phase. Petitioner's Double Jeopardy argument is not valid. Stroud v. United States, 251 U.S. 15, 64 L.Ed. 103, 40 S.Ct. 50 (1919).

It is the respondent's position that the original life sentence was an illegal sentence because 1) the trial court did not follow the procedure of F.S. 921.141 and 2) there was no legal justification for his departure from that procedure.

Petitioner's reliance upon Fasenmeyer v. State, 457 So.2d 1361 (Fla. 1984) and Troupe v. Rowe, 283 So.2d 857 (Fla. 1973) is misplaced. Fasenmeyer concerned the trial court's ability to increase a totally valid sentence after the appellate court has reduced the severity of other criminal convictions.

Respondent would also point out that the "issue" raised here is not yet ripe for review. Petitioner has not been re-sentenced. It is entirely possible that he will receive a life sentence after his case is remanded. In that case, the

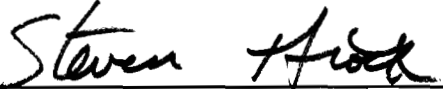
issue will be moot. If he is given the death penalty, his case will come before this Court on direct appeal and he can then argue Double Jeopardy. Does this Court want to hear this case before it is ripe for review?

CONCLUSION

This Court should not invoke its discretionary jurisdiction.

Respectfully submitted,

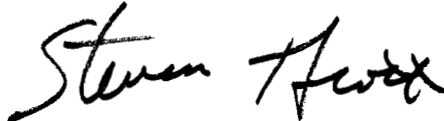
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON JURISDICTION** was furnished by mail to JOSEPH DURANT, Assistant Public Defender, 1351 N.W. 12th Street Miami, Florida 33125 on this 29th day of April, 1987.



STEVEN T. SCOTT
Assistant Attorney General

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