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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v.

CASE NO. 70,345

TRAVIS GENE McCALL,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Respondent McCall was charged by indictment with first degree murder of one Winston Bain (hereinafter referred to as the victim) (R 1398). A jury trial was conducted and the jury rendered a verdict finding respondent guilty of second degree murder (R 1208, 1586).

The recommended guideline range was between twelve and seventeen years imprisonment (R 1645-1646). The trial court promulgated four reasons for departure and senteced respondent to thirty years imprisonment (R 1641-1644). Respondent appealed the departure sentence challenging all four of the reasons. In the case under review, McCall v. State, 503 So.2d 1306 (Fla. 5th DCA 1987), the appellate court found all four reasons invalid as a matter of law (App. 1-2). Petitioner, the State of Florida, filed a motion for rehearing and a motion for rehearing en banc in the Fifth District Court of Appeal (App. 3-6). The Fifth District summarily denied the motion for rehearing and motion for rehearing en banc on March 20, 1987 (App. 7). Thereafter petitioner filed a timely notice to invoke this court's discretionary jurisdiction (App. 8). Jurisdictional briefs were filed. This court accepted jurisdiction. The Initial Brief on the Merits follows herein.

STATEMENT OF THE FACTS

Petitioner will set forth excerpts from the trial germane to the issue herein. Initially, petitioner would note that photographs of the victim's body while at the morgue were introduced into evidence (R 705-706).

The witness who discovered the body abandoned at a dump, saw the victim laying face down, with no pants, the shirt removed up to his head, and noticed "lots of blood." (R 780-781). The deputy who responded to the scene where the body was discovered, described a "pool of blood at his head." (R 785). Again, photographs were introduced into evidence showing the victim when he was first discovered (R 786-787).

Again, pertaining to the testimony about the injuries to the victim, a detective testified that when he saw the body at the dump site, there was also blood around the anal opening, as well as blood on the rear or back of the right eye, in addition to the blood around the head and the face (R 822, 827-828). Detective Fletcher found two blocks of wood near the crime scene (R 854-855). A splinter of wood was imbedded in the victim's forehead (R 855). The detective also discovered two concrete blocks near the crime scene which apparently had blood stains on them (R 856-857). In addition, a mop handle was also found at the scene (R 858). Deputy Haygood, testified that there were blood stains both on the wood pieces and the concrete blocks (R 879-882).

Doctor William Winter, the medical examiner, did the autopsy on the victim (R 957, 960-961). He indicated that there were obvious major injuries on the head and bruising of the muscles of

the forehead and over the left temporal area (R 960). The face was badly lacerated with clotted blood. The eye was swollen purple and there was a large laceration on the forehead to the extent that bone was actually uncovered. The lips were swollen. In addition, there was a laceration on the chin and a laceration on the back of the scalp (R 961). All together, there were three lacerations and a fourth injury. The injuries were consistent with blunt instruments (R 961-962). Describing the injury in more detail, the doctor explained, for example, that the facial injury was a "plate of bone (which) had been torn loose on that side." Again the doctor reiterated that the bone was showing through the wound (R 962-963, 967). The doctor also opined that there was a high degree of impact, that the injuries were consistent with a wood or blocks, and that death was caused by brain injuries (R 963, 969).

The doctor also noted there was a perforation of the rectum which was five centimeters above the anus (R 970). This occurred when the victim was either dead or very near the terminal stages of dying (R 971, 1347). Later on the doctor testified that indeed, the rectum was perforated, after death (R 989). The injury was consistent with the use of a broom handle (R 972).

Pertaining to the force used the doctor testified: ". . .I do not recall ever having seen this severe degree of fracture of the skull from a skull falling onto a hard object. This is a tremendous impact force." Later on, the doctor opined that the victim died instantaneously but then qualified his answer by the following: "I think so, but there is a sequence of injuries and

he may not have died from one of these series of injuries." The doctor also explained that the victim was not necessarily rendered unconscious initially (R 981). However, the doctor explained that either blow to the head would have rendered the victim unconscious (R 988).

SUMMARY OF ARGUMENT

The decision under review declares that the excessive use of force can never be a valid reason for departure in a homicide case under any circumstances. The case sub judice did not review the factual basis to determine whether the trial court's reason that excessive force was used was proper. Nor did the appellate court find that the trial court's departure reason was insufficient as a matter of law based upon what the trial court cited in the departure.

In light of the many guidelines cases that hold that excessive use of force or excessive brutality is a proper reason to depart both for homicide and non-homicide offenses, in order to promote the guidelines theme of uniformity, it would be necessary for this court to reverse the decision in question. The latter course is especially appropriate inasmuch as this court has held that excessive brutality is a proper reason to depart not only in non-homicide cases but also in homicide cases. No logical distinctions can be made between allowing departures for non-homicide cases but not for homicide cases, especially in light of the fact that a death sentence may be imposed for first degree murder based upon the fact that the murder was heinous, atrocious, or cruel.

Although the district court did not review the facts, petitioner submits the facts are certainly egregious and do support the trial court's reason to depart based upon the excessive brutality of the murder.

ARGUMENT

THE TRIAL COURT'S REASON FOR DEPARTURE BASED UPON THE EXCESSIVE BRUTALITY IN THE COMMISSION OF THE HOMICIDE SHOULD BE UPHELD.

In McCall v. State, 503 So.2d 1306 (Fla. 5th DCA 1987), the Fifth District Court of Appeals did not hold that the facts were insufficient to support the first departure reason nor did the district court hold that the facts as cited in the departure order were insufficient to support the reason for departure. Rather, the district court, in reversing the departure sentence, fashioned a policy which disallowed a departure for a homicide based upon any circumstances. The district court held that: "...the excessive use of force cannot be a valid reason for departure where death is a result of the criminal act for which the defendant was convicted."

The latter broad rule was ostensibly based upon Holden v. State, 487 So.2d 1199 (Fla. 5th DCA 1986). Holden, in turn was based upon Hannah v. State, 480 So.2d 718 (Fla. 4th DCA 1986). Yet the latter two cases did not create a bright line rule disallowing a departure based upon a homicide under any circumstances. This court should note that both Hannah and Holden, supra, were homicides based upon the use of a firearm where just one shot was utilized to kill the victim. Holden specifically noted that no departure would be allowed when the crime is perpetrated in a common manner. Yet Holden went on to explain: "This is not a case where the departure was based on 'the circumstances of the way the crime was commmitted indicating excessive brutality and clear premeditation' which may be

be considered under Lerma v. State, 476 So.2d 275 (Fla. 5th DCA ..." The district court went on to explain that neither the record in Holden nor the written reasons indicated that the killing was unusually cruel or that the victim suffered for a long period of time. 487 So.2d at 1201 n.1. The Fourth District Court of Appeal reached a similar conclusion in Hannah, supra. There, the reviewing court simply found that the nature of the shooting was merely an inherent component of the crime and did not constitute excessive brutality. Hannah and Holden, supra, both review the manner in which the homicide is carried out to determine if the excessive brutality can be utilized as a departure reason; McCall, supra, abolishes the reason all together without examining the particular circumstances of the homicide.

Petitioner would reiterate that other districts have upheld excessive brutality as a reason for departure in various homicide cases. Lewis v. State, 496 So.2d 211 (Fla. 1st DCA 1986); Allan v. State, 502 So.2d 950 (Fla. 2d DCA 1987); Harrington v. State, 455 So.2d 1317 (Fla. 2d DCA 1984). Indeed Allan, supra, predicated its holding on this court's decision in Lerma v. State, 497 So.2d 736 (Fla. 1986), and Vanover v. State, 498 So.2d 899 (Fla. 1986). If these latter cases followed the broad rule promulgated in McCall, supra, they would and could not reach the same result that they have. At the very least, McCall has created a conflict in this respect. This court should clarify McCall to the extent of whether its broad rule will be implied to all homicide cases willy nilly or whether excessive brutality can

be a potential reason to depart.

In Whistin v. State, 500 So.2d 730 (Fla. 2d DCA 1987), the defendant was convicted of attempted first degree murder, first degree arson, and sexual battery as well as other lesser offenses. Based upon the egregious circumstances surrounding the felonies, the appellate court upheld the departure based upon Vanover, supra. Petitioner perceives no logic in allowing a departure based upon an attempted first degree murder under these circumstances and disallowing a departure based upon a completed homicide. In Scurry v. State, 489 So.2d 25 (Fla. 1986), this court held that it was improper to depart based upon the fact that the victim lingered for thirty hours. This court explained that to uphold the latter departure reason would only insure that a defendant should do a thorough job in killing the victim. Likewise, to apply the reasoning in the case under review to Whistin, supra, would be tantamount to requiring a defendant to do a thorough job in committing a homicide as opposed to attempting such a killing. It certainly does not promote uniformity in sentencing to allow a departure based upon an attempted homicide and yet to disallow the departure with a more serious, completed homicide.

In any event, this court has placed its imprimatur on departing in a homicide case based upon the excessive force used during the homicide. In Hansbrough v. State, 509 So.2d 1081, 1087-1088 (Fla. 1987), the defendant was convicted of first degree murder and armed robbery. One of the issues in that case was based upon the departure for the armed robbery. The trial

court did depart based upon the excessive force used in the armed robbery, particularly based upon the facts that there was thirty one stab wounds to the victim. This court did uphold the departure and noted that excessive force had been upheld as a valid reason for departure in the past. Particularly, this court cited in support of the latter proposition Jefferson v. State, 489 So.2d 860 (Fla. 1st DCA 1986). Jefferson, entailed a manslaughter conviction based upon a killing of a two year old child. The departure was upheld based upon the savage and brutal beating of that child which caused cuts and injuries all over the child's body. As such, petitioner submits this court has upheld excessive brutality as a reason to depart in a homicide case, contrary to the holding in McCall, supra.

Moreover, the circumstances surrounding the commission of a first degree murder can mean the difference between a life or death sentence. Under section 921.141(5)(h), Florida Statutes (1985) if a capital felony is demonstrated to be especially heinous, atrocious, or cruel, such an aggravating factor can be utilized to impose the ultimate sentence. No doubt this court is very familiar with all the various circumstances that comprise this latter category. It would be totally incongruous, not to mention unjust, for purposes of sentencing policy, to allow such excessive brutality to mean the difference between life and death and yet to disallow a similar reason in departing from a presumptive guidelines recommendation.

It should be noted that the dissent in McCall, supra, recognized the distinction that petitioner is making herein. The

dissent characterized the events in this homicide as excessively brutal. The dissent noted that all murders involve the use of excessive force but distinguished those homicides where the methods are unusually cruel and brutal. Furthermore, Judge Sharp distinguished Holden, as petitioner has done herein. In any event, a review of the facts as set forth in this initial brief on the merits, amply support the reason that this murder was committed in an excessively brutal and grotesque manner.

Moreover, petitioner submits that the second departure reason in McCall, (the defendant committed sexual battery on the victim by penetrating the victim's anus with a metal pipe) can be additional evidence to uphold the excessive brutality of this homicide. Although respondent has argued that sexual battery is a crime for which there was no conviction under Florida Rule of Criminal Procedure 3.701(d)(11), petitioner would note that the medical examiner testified, later on in the trial, that the rectum was perforated after death (R 989). In any event, there is more than ample evidence to support the trial court's departure reason based upon excessive brutality when one considers the weapons used and the injuries sustained.

CONCLUSION

WHEREFORE, petitioner moves this honorable court to reverse the Fifth District Court of Appeal's decision in McCall v. State, 503 So.2d 1306 (Fla. 5th DCA 1987), and to uphold the departure reason promulgated by the trial court that the murder was excessively brutal, and to remand this cause back to the district court to affirm the trial court's departure sentence based upon the excessive brutality of the homicide.

Respectfully submitted,

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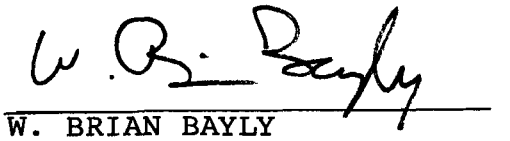

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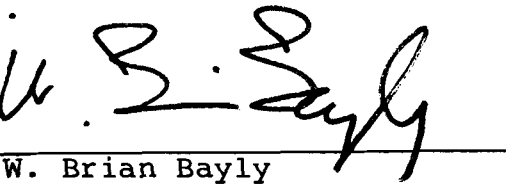
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing PETITIONER'S BRIEF ON THE MERITS, has been furnished, by mail to Michael S. Becker, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 21st day of September, 1987.



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