IN THE SUPREME COURT OF FLORIDA

HAROLD GENE LUCAS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 70,653

FILED
SID J. WHITE
SEP. 7 1989
CLERK, SUPREME COURT
By
Deputy Clerk

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, Harold Gene Lucas, will rely upon his initial brief in reply to the arguments Appellee makes in its answer brief as to Issues I, V, and XI.

ARGUMENT

ISSUE II

THE COURT BELOW ERRED IN TAKING JUDICIAL NOTICE OF THE FACT THAT APPELLANT WAS FOUNDGUILTY ON JANUARY 14, 1977 OF THE ATTEMPTED FIRST DEGREE MURDERS OF TERRI L. RICE AND RICHARD BYRD, JR., AND IN SO INFORMING THE JURY.

Appellee's argument that the trial court properly took judicial notice of the matters requested by the State is premised upon the applicability of the Evidence Code to Appellant's case. However, as Appellant noted in his initial brief at page 38, the offenses herein occurred long before the Evidence Code became effective. In Sarno v. State, 424 So.2d 829 (Fla. 3d DCA 1982) the court stated:

> ... [A]lthough the Florida Evidence Code would clearly render ultimate fact opinion admissible, § 90.703, Fla. Stat. (1979), its effective date of July 1, 1979 makes it inapplicable to the present case [where crimes occurred before Code's effective date]. § 90.103(2), Fla. Stat. (1979). In re Evidence Code, 376 So.2d 1161 (Fla. 1979).

424 So.2d at 836. And in McRae v. State, 383 So.2d 289 (Fla. 2d DCA 1980) the court agreed with the appellant's position that

certain testimony constituted hearsay, even though it would not be hearsay under the Evidence Code, because the Code did not apply to appellant's crimes committed before its effective date.

In Huff v. State, 495 So.2d 145 (Fla. 1986), a death penalty case, this Court held that the trial court erred in taking judicial notice of the proceedings in Huff's first trial when he was retried. This Court mentioned the "great caution" that trial courts should exercise when taking judicial notice. 495 So.2d at 151.

Florida Rule of Criminal Procedure 3.640(a), which this Court cited in Huff, provides that "[w]hen a new trial is granted, the new trial shall proceed in all respects as if no former trial had been had..." In Lucas v. State, 490 So.2d 943 (Fla. 1986) this Court granted Appellant a new trial, albeit on penalty only, and he was entitled to have that trial conducted in accordance with Rule 3.640(a).

In Carella v. California, 491 U.S. ___, 109 S.Ct. ___, 105 L.Ed.2d 218 (1989) the Supreme Court of the United States invalidated certain jury instructions which created mandatory presumptions against the accused, and stated:

> The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of libertyunless the prosecution proves beyond a reasonable doubt every element of the charged offense. [Citation omitted]. Jury instructions relieving States of this burden violate a defendant's due process rights. [Citations omitted].

105 L.Ed.2d at 218. Appellant was similarly denied due process when the court below erroneously granted the State's request and exercised judicial notice.

ISSUE III

THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE AT APPELLANT'S PENALTY TRIAL EVIDENCE OF THE MENTAL ANGUISH AND PHYSICAL PAIN ENDURED BY TERRI RICE AND RICHARD BYRD, JR.

Appellee consumes much of its argument contending that Appellant's objection to the evidence regarding the attempt murders of Rice and Byrd came too late because considerable testimony as to the pain and suffering endured by Rice and Byrd had already come in. However, a good deal of additional prejudicial testimony was adduced after Appellant interposed his objection, as summarized at pages 42-43 of Appellant's initial brief. Furthermore, if Appellant's objection was somehow insufficient, the admission of such extensive testimony concerning the anguish of Rice and Byrd must be considered fundamental error. Fundamental error is that error which amounts to a denial of due process of law. Ray v. State, 403 So.2d 956 (Fla. 1981). The doctrine of fundamental error will be applied where the interests of justice present a compelling demand for its application. Smith v. State, 521 So.2d 106 (Fla. 1988). Surely a case in which the ultimate penalty may have been imposed on the basis of evidence of dubious relevance which served only to inflame the jury and inject emotionalism into the proceedings must be a case calling for the invocation of the

fundamental error doctrine.

In Rhodes v. State, 14 F.L.W. 343 (Fla. July 6, 1989) this Court made it clear that there are strict limits upon what evidence may be presented by the State at penalty phase as to the details of other violent felonies the defendant may have committed. "[T]he line must be drawn when that testimony is not relevant, gives rise to a violation of a defendant's confrontation rights, or the prejudicial value outweighs the probative value." 14 F.L.W. at 345. In Rhodes evidence which "described the physical and emotional trauma and suffering of a victim of a totally collateral crime committed by the appellant" was "irrelevant and highly prejudicial to Rhodes' case" and should not have been admitted. The evidence the State presented in Harold Gene Lucas' case of the physical and emotional trauma of Terri Rice and Richard Byrd is precisely the type of evidence this Court said in Rhodes must be excluded. In footnote 6 in Rhodes this Court suggested that evidence of prior convictions for violent crimes should not go beyond the fact of conviction and the basic circumstances of the crimes.

ISSUE IV

THE COURT BELOW ERRED IN PERMITTING THE STATE TO INTRODUCE DAMAGING HEARSAY TESTIMONY AGAINST APPELLANT, WHILE DENYING APPELLANT THE OPPORTUNITY TO PRESENT HEARSAY TESTIMONY THAT WAS CRITICAL TO HIS DEFENSE.

Defense counsel asked defense witness Georgina Martin the following question on direct examination: "Mrs. Martin, did the

girl who sold this [drug] to Gene and Dean indicate to you that it was called angel dust or PCP?" (R518) Appellee claims not to be able to tell from this question whether the girl from Miami who brought the drug to sell "actually told [Georgina Martin] the name of the drug or simply 'indicated' in some way the name of the drug, if at all." (Answer Brief of Appellee, p. 19). However, Martin went on to testify that she heard what the drug was called. (R519) The only fair reading of the totality of Martin's testimony is that her friend from Miami told her the name of the drug in question.

ISSUE VI

THE COURT BELOW ERRED IN PERMITTING THE JURORS TO TAKE NOTES DURING APPELLANT'S PENALTY PHASE, AND TO USE THEIR NOTES DURING DELIBERATIONS, WITHOUT INSTRUCTING THE JURY ON THE PROPER WAY TO TAKE AND USE NOTES.

Appellee claims that United States v. Maclean, 578 F.2d 64 (3d Cir. 1978) was "affirmed on the general principle that note-taking is primarily a matter of judicial discretion of the trial judge" and that the court never said it would require reversal if appropriate instructions on note-taking were not given. (Answer Brief of Appellee, pp. 23-24). However, the Maclean jurors were "fully informed" on the "proper use of notes and the pitfalls to be avoided." 578 F.2d at 67. This fact was prominent in the court's opinion, and it is not clear, as Appellee seems to suggest, that the court would have affirmed had the jury not been properly instructed.

In affirming the conviction in United States v. Rhodes, 631 F.2d 43 (5th Cir. 1980), the court emphasized that the trial in question "lasted only one day and involved one defendant." 631 F.2d at 46. For this reason the court could not say that "the trial was so long or the issues so complex that the jurors must have given the notes undue importance in their deliberations." 631 F.2d at 46. The opinion thus suggests that the court might well have reversed had the trial been a multi-day affair involving complex issues, as Appellant's penalty trial.

ISSUE VII

THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO SYSTEMATICALLY EXCLUDE ALL POTENTIAL JURORS WHO EXPRESSED RESERVATIONS ABOUT THE DEATH PENALTY PRODUCED A JURY THAT WAS UNCOMMONLY WILLING TO CONDEMN APPELLANT TO DIE AND THEREBY VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO BE TRIED BY *AN* IMPARTIAL JURY.

Appellee quotes from separate opinions in Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) for the proposition that

> a majority of the [Supreme] Court already is on record expressing the view that the Constitution does not prohibit the prosecutorial use of peremptory challenges to exclude jurors with reservations about the death penalty.

(Answer Brief of Appellee, p. 29). Appellee's "majority" consisted of Justices Powell, Scalia, Rehnquist, White, and O'Connor. However, Justice Powell is no longer on the Court. Without him the

"majority" of five is no longer a majority.

Furthermore, in the portion of the dissenting opinion quoted at pages 27-28 of the Answer Brief of Appellee, Justice Scalia, joined by the Chief Justice, Justice White, and Justice O'Connor, noted that the Gray plurality implied in dictum that "it is unconstitutional for prosecutors to use peremptory challenges consistently to exclude potential jurors who express reservations about capital punishment." 95 L.Ed.2d at 646. Thus it appears that the present members of the Court who have expressed an opinion on this issue are evenly divided.

Another case relevant to this discussion is In re Anderson, 73 Cal. Rptr. 21, 447 P.2d 117 (Cal. 1968), which the Gray Court mentioned in footnote 9. at 95 L.Ed.2d 634. In Anderson the court rejected the State's argument that any error under Witherspoon[1] in excusing for cause jurors opposed to the death penalty is nonprejudicial where the prosecution had sufficient peremptory challenges remaining to remove all such jurors. The court stated:

> ... [I]n arguing that it may be assumed that the prosecutor would have used his peremptory challenges to remove veniremen who under Witherspoon were improperly excused for cause, the Attorney General bases his argument on a concept of an impartial jury that is in conflict with the majority opinion in Witherspoon. Under the view of the Witherspoon majority a jury from which all prospective jurors opposed

[1] Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

> the death penalty have been excluded is not an impartial jury but rather constitutes a "hanging jury," one that is "uncommonly willing to condemn a man to die," and one that "cannot speak for the community" but "can speak only for a distinct and dwindling minority." We cannot engage in conjecture that the prosecutor would have used his peremptory challenges to excuse all such jurors.

447 P.2d at 122.

ISSUE VIII

THE SENTENCING ORDER ENTERED BY THE COURT BELOW IS NOT SUFFICIENTLY CLEAR TO ESTABLISH THAT THE COURT ENGAGED INAREASONEDWEIGHINGOFAGGRAVATING AND MITIGATING CIRCUMSTANCES, AND SO WILL NOT SUPPORT THE SENTENCE OF DEATH IMPOSED UPON APPELLANT.

Appellee's attempt to distinguish Scull v. State, 533 So.2d 1137 (Fla. 1988) from Appellant's case in unavailing. Although Scull involved a cross-appeal in which the State attacked the trial court's finding in mitigation that Scull had no significant history of prior criminal activity, and the instant case does not involve a cross-appeal, this fact in no way alters or detracts from this Court's holding in Scull that a history of prior criminal conduct for the purpose of negating this mitigator cannot be established by contemporary crimes. Appellee is urging a distinction without a difference.

Both Judge Shands, who originally sentenced Appellant to death, and Judge Reese, who sentenced Appellant to death after the

second remand, found in mitigation that Appellant had no significant prior criminal history. Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979); Lucas v. State, 490 So.2d 943, 944-945 (Fla. 1986). This Court gave at least tacit approval to this finding in Appellant's previous appeals. Yet Judge Reese inexplicably refused to find this mitigator when Appellant's case came before him again for sentencing. Appellee urges application of the law of the case doctrine to uphold the aggravating circumstance of previous conviction of a violent felony, based upon the contemporaneous attempted murders of Terri Rice and Richard Byrd. (Answer Brief of Appellee, p. 34). Similar deference should be accorded to the finding in mitigation that Appellant had no significant history of prior criminal activity.

ISSUE IX

THE TRIAL COURT ERRED BY SENTENCING HAROLD GENE LUCAS TO DIE IN THE ELECTRICCHAIRBECAUSETHESENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. The State did not prove beyond a reasonable doubt that the homicide of Jill Piper was especially heinous, atrocious or cruel.

In Rhodes v. State, 14 F.L.W. 343 (Fla. July 6, 1989) this Court rejected a lower court finding that the homicide was

especially heinous, atrocious, or cruel where the victim, who was apparently manually strangled, may have been semiconscious at the time of her death because of heavy drinking. Here, as in Rhodes, the circumstances surrounding the victim's death are not clear, but here there is even more concrete evidence than in Rhodes that the deceased was intoxicated: expert medical testimony established that Jill Piper's blood alcohol level was 0.12 per cent. (R476-477) As in Rhodes, this Court should reject the trial court's finding that the homicide herein was especially heinous, atrocious, or cruel, if indeed that is what the trial court found, as Appellee claims.

B. The cold, calculated, and premeditated aggravating circumstance does not apply to Appellant's case.

In Stano v. Duaaer, Case No. 88-425-Civ-Orl-19 (M.D. Fla. May 18, 1988), although the court ultimately denied Stano's petition for writ of habeas corpus and motion for stay of execution,[2] the court held that the cold, calculated, and premeditated aggravating circumstance violates constitutional prohibitions against ex post facto laws when applied to crimes committed before the effective date of section 921.141(5)(i), Florida Statutes. The court offered this cogent analysis at pages 38-40 of its order:

The Supreme Court has held that

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[2] The Eleventh Circuit granted Stano's application for certificate of probable cause and for a stay of execution on the same day the Middle District denied his petition and motion but did not address the ex post facto issue raised herein. Stano v. Dugger, 846 F.2d 1286 (11th Cir. 1988).

three critical elements must be present to establish an ex post facto clause violation. First, the statute must be a penal or criminal law. Second, the statute must apply retrospectively. Finally, the statute must be disadvantageous to the offender because it may impose greater punishment. [Footnote omitted]. Weaver v. Graham, 450 U.S. 24 (1981); see also Miller v. Florida, ___ U.S. ___, 107 S.Ct. 2446, 2451 (1987). A law may violate the ex post facto prohibition even if it "merely alters penal provisions accorded by the grace of the legislature." Id. at 30-31. The challenged statute need not impair a "vested right" in order to be found violative of the ex post facto clause. Id. A law which is merely procedural and does not add to the quantum of punishment, however, cannot violate the ex post facto clause even if it is applied retrospectively. Id. at 32-33 & n. 17. See Dobbert v. Florida, 432 U.S. 282, 293 (1977) ("even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto.") With these principles in mind, the Court will consider whether Mr. Stano has stated an ex post facto claim.

In the instant case, Florida Statute § 921.141(5)(i) (1979) is clearly a penal or criminal statute since it deals with the quantum of punishment that may be imposed upon a person convicted of a capital felony. Section 921.141(5)(i) also operates retrospectively because it changes the legal consequences of acts completed before the effective date of July 1, 1979. That is, the change in the sentencing statute allowed the trial judge to consider an additional aggravating factor which could increase the quantum of punishment from life imprisonment to death under Florida's sentencing scheme of weighing and balancing

> aggravating and mitigating factors. Finally, there is no doubt that the addition of a new aggravating factor could disadvantage a criminal defendant on trial for his or her life. Under Florida's capital sentencing scheme the trial judge and sentencing jury are charged with the duty of weighing and balancing all factors in aggravation and mitigation. Under such a delicate scheme, the presence or absence of an aggravating factor could be outcome determinative. Accordingly, this Court finds that Florida Statute § 921.141(5)(i) (1979), adding an additional aggravating factor to Florida's capital sentencing scheme, is unconstitutional as applied to Gerald Stano, whose crimes occurred before the statute's effective date.
>
> C. The trial court erred in its treatment of mitigating evidencewhen he refused to admit some evidence, and did not give adequate or any consideration to other mitigation.

Appellee suggests at page 43 of its brief that certain factors apart from the attempted murders of Terri Rice and Richard Byrd might support the trial court's refusal to find in mitigation that Appellant had no significant history of prior criminal activity (none of which was relied upon by the trial court in his sentencing order. (R889-892))[3] As for Appellant's use and sale of drugs, the record does not show that Appellant was ever convicted or even arrested in connection with these activities. At any rate, Appellant's longstanding drug problem is a factor

[3] As discussed in Issue VIII herein, Judge Reese had previously found this mitigator to exist, as had Judge Shands before him, and this Court tacitly approved this finding in Appellant's previous appeals.

which mitigates his culpability, rather than negating mitigation. The alleged "threats, intimidation" mentioned by Appellee, which Appellant either did not remember or denied (R599-600), were part and parcel of the instant offense, not something that would establish any type of criminal history. Cf. Scull v. State, 533 So.2d 1137 (Fla. 1988). And the so-called "violence" referred to by Appellee was the mutual combat in which Eddie Kent and Appellant engaged on the night preceding the homicide, after Appellant had been drinking and using drugs all day.

ISSUE X

THE TRIAL COURT ERRED IN SENTENCING HAROLD GENE LUCAS TO DEATH BECAUSE SUCH A SENTENCE IS DISPROPORTIONAL TO THE CRIME HE COMMITTED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Sonaer v. State, 544 So.2d 1010 (Fla. 1989) this Court engaged in a proportionality analysis to reject Songer's death sentence, which had been imposed pursuant to the jury's recommendation that Songer die in the electric chair. Among the mitigating circumstances cited prominently by the Court in its opinion were Songer's remorse, his chemical dependency on drugs, and his history of adapting well to prison life and using the time for self-improvement. All these factors apply to Harold Gene Lucas. He expressed remorse for the homicide of Jill Piper. (R598, 619, 908) He had a history of drug and alcohol abuse. (R515, 526, 542, 593, 599, 601-602, 617, 908) And he had a clean

prison record since 1979, and was taking correspondence courses in an effort to better himself. (R908)

In view of the substantial mitigation present in Appellant's case, and the illegitimacy of at least some, if not all, of the aggravation relied upon by the court below, this Court should vacate Appellant's sentence of death, as it did that of Carl Ray Songer.

CONCLUSION

Appellant, Harold Gene Lucas, renews his prayer for the relief requested in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 5th day of September, 1989.

Respectfully submitted,

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