

IN THE SUPREME COURT OF FLORIDA

HAROLD GENE LUCAS,

Appellant,

vs.

Case No. 70,653

STATE OF FLORIDA,

Appellee.

FILED

ED J. WHITE

JUN 22 1989

CLERK SUPREME COURT

Deputy Clerk

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

SUPPLEMENTAL BRIEF OF APPELLANT

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

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Amend. VIII, U.S. Const. 6
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PRELIMINARY STATEMENT

The initial brief served by Appellant herein on March 22, 1989 contains issues numbered I through X. The issue raised in this supplemental brief is numbered XI.

STATEMENT OF THE FACTS

Appellant makes the following additions to the Statement of the Facts contained in his initial brief:

State witness Terri Rice testified on cross-examination that she did not see Ricky Byrd or Jill Piper drinking any alcohol on the night of the homicide, and that Rice, Byrd, and Piper were not doing drugs that night. (R280, 286). Counsel for Appellant attempted to ask Rice if she knew if Jill Piper did in fact use drugs, but the court sustained an objection to this question on grounds it was irrelevant. (R286-287)

State witness Ricky Byrd testified that he saw Jill Piper drink one beer on the night in question. (R446-447) He did not believe Piper and Rice were using any other drugs. (R446-447)

Byrd was not using drugs that night (although he did drink three or four beers), but in the past he had smoked "pot," and had tried other drugs, including Quaaludes and cocaine. (R446-447)

Defense witness Georgina Martin testified that probably 99 out of 100 of her friends used drugs at the time involved herein [August of 1976]. (R514) Everyone involved "in this" did drugs. (R514)

SUMMARY OF THE ARGUMENT

Jill Piper, the deceased herein, in effect "testified" at Appellant's penalty trial through the mouths of others. Richard Byrd spoke of the fear Piper said she felt on the evening preceding her death, and Franklin "Flip" Dorothy testified to Piper's account of threats Appellant allegedly made against her during the week preceding the homicide, which threats Appellant denied making. The jury should have been permitted to consider testimony regarding whether Piper was a drug user, as it was relevant to whether her fear was justified, and went to her ability accurately to remember and describe the alleged threats.

ARGUMENT

ISSUE XI

THE COURT BELOW ERRED IN REFUSING TO ALLOW COUNSEL FOR APPELLANT TO ELICIT FROM STATEWITNESS TERRI RICEWHETHER THE HOMICIDE VICTIM HEREIN, JILL PIPER, WAS A DRUG USER.

State witnesses Terri Rice and Richard Byrd, Jr. both indicated at Appellant's penalty trial that the homicide victim herein, Jill Piper, had not been using drugs on the night of the homicide, although Byrd did see Piper drink one beer. (R280, 286, 446-447)¹

On cross-examination of Terri Rice, counsel for Appellant asked Rice if she knew if Jill Piper did in fact use drugs, but the trial court sustained a State objection on relevancy grounds, and the witness did not answer the question. (R286-287)

Defense counsel's question was proper and relevant and should have been permitted by the court below.

In Cruz v. State, 437 So.2d 695 (Fla. 1st DCA 1983) the court recognized that a witness's drug-taking at times other than during the occurrence of the offense or at the time the witness is testifying is a proper subject for cross-examination, as use of drugs may adversely affect the ability of the witness to remember accurately the facts which are the subject of his testimony.

¹ The medical examiner who autopsied Piper found that she had 0.12 per cent alcohol in her blood. (R476) A screening test for drugs was negative. (R476)

In Duncan v. State, 450 So.2d 242 (Fla. 1st DCA 1984) the court held that the defense should have been permitted to ask a key witness whether he had been a marijuana user for some time. A State objection on relevancy grounds was improperly sustained because "questions directed to the extent of time the witness had consumed narcotics were highly pertinent to the issue of potential misidentification." 450 So.2d at 245.

Finally, in Weeks v. State, 241 So.2d 203 (Fla. 2d DCA 1970) it was the prosecutor who inquired of a defense witness about her use of "acid." The court found this to be a proper subject for cross-examination.

Although Jill Piper obviously did not herself testify at Appellant's trial, she did, in effect, "testify" through the mouths of others. For example, Ricky Byrd testified that Jill Piper and Terri Rice told him they were "very frightened." (R414) He said Piper and Rice were very scared and kept insinuating to Byrd that they were frightened for their lives. (R415) Had the jurors been apprised of drug usage on the part of Jill Piper, they would have been in a better position to evaluate whether her fears and concerns were justified, or were inspired in whole or in part by drug-induced paranoia.

Furthermore, State witness Franklin "Flip" Dorothy was permitted to testify over defense objections to what Jill Piper had told him concerning threats Appellant allegedly made against Piper

in the days preceding the homicide. (R389-390)² Appellant denied making these threats. (R600) Thus Jill Piper's credibility vis a vis that of Appellant was directly at issue. Evidence that Piper was a regular user of drugs might have caused the jury to conclude that her ability accurately to recall and recount events was thereby substantially diminished, thus lessening the impact of Dorthy's testimony.

For these reasons, evidence as to whether Jill Piper was a drug user was relevant, and the jury should have been allowed to consider it. Because they were not, Appellant was deprived of a fair penalty trial and the due process of law to which he was entitled, and subjected to cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article One, Sections Nine and Seventeen of the Constitution of the State of Florida. Appellant must receive a new penalty trial before a new jury impaneled for that purpose.

² Please see Issue IV in Appellant's initial brief regarding the hearsay aspects of Dorthy's testimony.

CONCLUSION

Appellant's sentence of death was imposed in violation of the state and federal constitutions. He must receive a new penalty trial before a new jury impaneled for that purpose.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Tampa Attorney General's Office, and to Harold Gene Lucas, Inmate No. **058279**, Florida State Prison, P.O. Box **747**, Starke, FL **32091**, on this 20th day of June, 1989.

Respectfully submitted,



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