IN THE SUPREME COURT OF FLORIDA

MELVIN TROTTER,

Appellant,

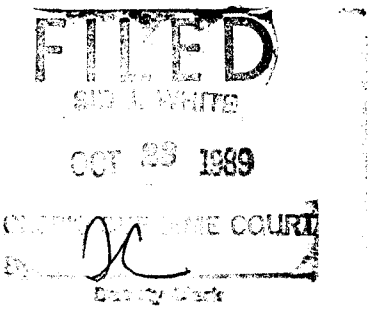
vs.

Case No. 70,714

STATE OF FLORIDA,

Appellee.

_____.



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

REPLY BRIEF OF APPELLANT

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

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

STATEMENT OF THE CASE

Appellant will rely upon the statement of the case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon the statement of the facts as presented in his initial brief.

SUMMARY OF THE ARGUMENT

In reply to appellee's assertion that he failed to establish prejudice of his substantial rights, Appellant shows two reasons why a new trial should be granted. First, defense counsel did not agree that the jurors could use the telephone after retiring for deliberations ***so*** that the resulting separation of jurors falls within the rule of jury sequestration during deliberations in a capital case. Second, although at least three jurors used the telephone, only one was ever interviewed. The trial court denied Appellant an opportunity to demonstrate that he was prejudiced. A remand for juror interviews would be ineffective relief at this point in time.

The trial court's finding that prospective juror Burse was excludable for cause because of his views about the death penalty is not fairly supported by the record. There is no indication that the trial judge relied on the prospective juror's demeanor. Rather, he applied an erroneous standard of law.

A capital defendant does not waive the erroneous finding of an aggravating circumstance by failure to object in the trial court. **A** consensus of authorities declares that

community control is not a sentence of imprisonment.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY REQUIRING APPELLANT TO EXHAUST HIS PEREMPTORY STRIKES ON PROSPECTIVE JURORS WHO SHOULD HAVE BEEN EXCUSED FOR CAUSE BECAUSE OF THEIR EXPOSURE TO PREJUDICIAL PUBLICITY.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE II

THE TRIAL JUDGE ERRED BY FAILING TO CONDUCT A SUFFICIENT INVESTIGATION INTO EXTRANEOUS INFLUENCES IN THE JURY DELIBERATIONS AND DENYING APPELLANT'S MOTION FOR NEW TRIAL.

Appellant agrees with appellee that, under ordinary circumstances, a defendant must show not only that the jury received extrinsic evidence, but that his "substantial rights" were prejudiced in order to win a new trial. See e.g., Doutre v. State, 539 So.2d 569 (Fla. 1st DCA 1989). There are two reasons however why this general rule is inapplicable at bar.

The first of these is that this is a capital case. As appellee recognizes, Livingston v. State, 458 So.2d 235 (Fla. 1984) establishes a rule of reversible error in a capital case when jurors separate once their deliberations have begun. Brief of appellee, p. 26. Appellee is incorrect, however when he states that Brookinas v. State, 495 So.2d 135 (Fla. 1986) requires a showing of prejudice "when the jury separates in

violation of Livingston." Brief of appellee, p. 27. The rationale of Brookinas rests on equitable estoppel. It would be unfair for counsel to agree to an overnight separation of jurors and then request a mistrial based upon the separation alone. At bar, defense counsel never agreed that the jurors could use the telephone once they had retired for deliberations. Hence, prejudice need not be shown.

The second reason why Trotter should now receive a new trial is that the trial court prevented him from investigating whether there were improper telephone communications. As appellee acknowledges, the record reflects that "three people used the phone." Brief of appellee, p. 25. Of these, only juror Morris was interviewed. Appellee's statement that "the trial court allowed defense counsel to interview Ms. Morris" (Brief of appellee, p. 27) is somewhat curious since the defense investigator who contacted juror Morris had to defend himself in a contempt hearing. (R2611-19) The court did not permit interviews of the other jurors, not even the ones who actually used the telephone.

Sconvers v. State, 513 So.2d 1113 (Fla. 2d DCA 1987) is cited by appellee in his brief at p. 26 for the proposition that the trial court should allow the defendant to interview jurors when juror misconduct is alleged. This is what Trotter asked of the trial judge. The relief given the defendant in Sconvers was a remand to conduct juror interviews. That relief is not appropriate at bar because Trotter's trial was held March 30

through April 9, 1987. (R1-2223) It would be pointless to ask jurors what they remembered hearing on the telephone three years ago. Accordingly, Trotter should now receive a new trial.

ISSUE III

THE TRIAL JUDGE ERRED BY DENYING APPELLANT'S MOTION TO DISQUALIFY PROSECUTOR BECAUSE THE ASSISTANT STATE ATTORNEY ASSIGNED TO THE CASE HAD PREVIOUSLY REPRESENTED TROTTER.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE IV

THE TRIAL COURT ERRED BY EXCUSING PROSPECTIVE JUROR BURSE FOR CAUSE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

Appellee maintains in his brief that the trial court's decision whether to strike a prospective juror for cause should be given deference. While this is true, the question on review is whether the trial court's findings are "fairly supported by the record" Wainwright v. Witt, 469 U.S. 412 at 434 (1985). The finding that prospective juror Burse was excludable for cause because of his views on the death penalty lacks support in the record.

The limited excerpt[1] of the voir dire quoted by appellee in his brief shows that the prospective juror was "a little bit uncomfortable with the concept [of a death sentence]"

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[1] Appellant has attached the entire relevant questioning of prospective juror Burse as an appendix to this brief.

(Brief of Appellee p. 31, R98, see Appendix). He explained, "I don't hunt and I don't kill, *so* I don't know" (Brief of Appellee p. 31, R98, see Appendix). The law however, does not require a juror in a capital case to be enthusiastic about the death penalty. Neither are jurors required to be hunters.

The prosecutor then questioned prospective juror Burse:

> You'll be given evidence and argument on the aggravating circumstances versus the mitigating circumstances. And after you hear this, then you have to engage in a weighing process; which weighs more heavily, which is the appropriate penalty in this case.
>
> Do you think that you could follow the law in that regard if you found the aggravating circumstances outweighed the mitigating circumstances; when death is the appropriate sentence in this case, could you *so* vote?
>
> PROSPECTIVE JUROR BURSE: I don't know.
>
> MR. SEYMOUR: Can you assure us that you would give it your best effort to follow the law in that situation?
>
> PROSPECTIVE JUROR BURSE: Yes.

(Brief of Appellee p.32, R98-9, see Appendix).

The prosecutor's statement was not an accurate rendition of capital sentencing law. As section 921.141(2), Florida Statutes (1985) provides:

> (2) ADVISORY SENTENCE BY THE JURY.-After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following

> matters:
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection *(5):*
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Clearly there must be sufficient aggravating circumstances present in order to even consider a sentence of death. As this Court has said regarding the death penalty, "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes.'' State v. Dixon, 283 So.2d 1 at 7 (Fla. 1973). Prospective juror Burse's non-committal response shows a correct impartial attitude rather than impairment.

Finally, appellee contends that the trial judge could conclude from "the demeanor of the prospective juror that his attitude would prevent or impair his performance of duties as a juror." Brief of Appellee, p. 33. There is absolutely no evidence in the record that the trial judge relied on the prospective juror's demeanor in striking him for cause. Rather, the trial judge deferred to the prosecutor's misstatement of the law:

> I think he did express doubts, and I believe that Mr. Seymour's impression of the law is correct so I will grant that. (R139, see Appendix).

Appellee relies heavily on the United States Supreme Court's decision in Wainwright v. Witt, 469 U.S. 412 (1985). It must be remembered that Witt did not represent a change in the law; rather, the Court specifically reaffirmed the standard announced in Adams v. Texas, 448 U.S. 38 (1980). 469 U.S. at 420-4. It remains the burden of the party seeking exclusion to show that the prospective juror lacks impartiality. 469 U.S. at 423. Mere qualms about the death penalty are insufficient; the State must show that the prospective juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'' 469 U.S. at 420, quoting from Adams, 448 U.S. at 45.

At bar, there is no evidence that prospective juror Burse would have disregarded the court's instructions or violated his oath. In response to questioning by the trial judge, the prospective juror agreed that he "would be able to follow the law as [instructed] in determining whether or not [he] would recommend death as a possible penalty." (R126, see Appendix) The State should have been required to expend a peremptory strike if they did not want to seat a juror who would give "some awful terrible consideration" to his penalty recommendation. (R123, see Appendix)

ISSUE V

EVIDENCE THAT TROTTER WAS ON COMMUNITY CONTROL AT THE TIME OF THE OFFENSE SHOULD NOT HAVE BEEN PRESENTED DURING THE PENALTY PROCEEDING AND SHOULD NOT HAVE BEEN CONSIDERED BY THE SENTENCING JUDGE AS AN AGGRAVATING CIRCUMSTANCE.

Appellee first argues that Trotter waived application of the section 921.141(5)(a) aggravating circumstance by failing to challenge it at the trial court level. This argument is specious because all aggravating circumstances must be proven beyond a reasonable doubt. Even where a defendant has not contested application of an aggravating factor on appeal, this Court has not hesitated to strike improperly found circumstances. See e.g., Bello v. State, Case No. 70,552 (Fla. July 6, 1989) [14 FLW at 341]; Richardson v. State, 437 So.2d 1091 at 1094 (Fla. 1983).

In addition to the authorities cited in his initial brief, Appellant also relies on the following decisions

In the Interest of B.A., 546 So.2d 125 (Fla. 1st DCA 1989)

Matthews v. State, 529 So.2d 361 (Fla. 2d DCA 1988)

for the proposition that community control is not a sentence of imprisonment.

ISSUE VI

THE TRIAL JUDGE ERRED BY RULING APPELLANT'S ARTWORK INADMISSIBLE AS PENALTY PHASE EVIDENCE. HIS SUBSEQUENT REVERSAL OF THIS RULING AFTER JURY DELIBERATIONS HAD BEGUN DID NOT RECTIFY THE ERROR.

ISSUE VII

THE TRIAL COURT'S INSTRUCTION ON THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY VAGUE BECAUSE IT DID NOT INFORM THE PENALTY JURY OF THE LIMITING CONSTRUCTION GIVEN TO THIS AGGRAVATING CIRCUMSTANCE.

ISSUE VIII

THE SENTENCING JUDGE ERRED BY FINDING THE § 921.141(5)(h) AGGRAVATING FACTOR BECAUSE THE FACT THAT THE VICTIM WAS KILLED IN THE STORE SHE OPERATED IS IRRELEVANT AND THE CRIME WAS NOT SET APART FROM THE NORM OF CAPITAL FELONIES.

Appellant will rely upon the arguments as presented in his initial brief.

CONCLUSION

Appellant will rely upon the conclusion as presented 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 20th day of October, 1989.

Respectfully submitted,

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