IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 71,~~356~~ 357

DEE DYNE CASTEEL

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

SUPPLEMENTAL BRIEF OF APPELLANT DEE DYNE CASTEEL

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STATEMENT OF THE ARGUMENT

The imposition of the death penalty by the trial court upon Defendant-Appellee Dee Dyne Casteel should be reversed and set aside because Florida's statutory scheme for the handling of the sentencing portion of a death penalty case, as embodied in Section 921.141, Florida Statutes, vests a constitutionally impermissible element of possible arbitrariness in the judge in that while such statutory scheme directs that the jury -- whose role is to recommend life or death to the judge -- to consider whether any statutory aggravating circumstances were present and, if so, to consider the existence of any mitigating circumstances, and if any do exist, whether they outweigh any aggravating circumstances, it does not require the jury to report to the judge as to its findings in this regard and it does not specify what weight the judge need give the jury's recommendation of death in making its own determination of whether to impose the death peanlty.

Based thereupon, it is this defendant-appellee's contention that this deficiency in the Florida sentencing phase portion of it's death penalty law is violative of her right to be free of cruel and unusual punishment under the Eighth Amendment and the Fourteenth Amendment to the U.S. Constitution, and under Article I, Section 12, Constitution of the State of Florida, and her right to a fair trial and the due process of the law as protected by the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 9, Constitution of the State of Florida.

ARGUMENT

IN BEING SENTENCED TO DEATH BY THE TRIAL JURY BELOW THIS DEFENDANT APPELLEE WAS DENIED HER FEDERAL AND STATE CONSTITUTIONALLY GUARANTEED RIGHTS TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENT AND TO BE ACCORDED A FAIR TRIAL AT THE SENTENCING PHASE OF HER TRIAL AND THE DUE PROCESS OF THE LAW IN THAT FLORIDA'S STATUTORY SCHEME FOR THE HOLDING OF THE SENTENCING PHASE OF A DEATH PENALTY TRIAL (AS EMBODIED IN SECTION 921.141, FLORIDA STATUTES) INJECTED A CONSTITUTIONALLY IMPERMISSIBLE AMOUNT OF ARBITRARINESS INTO THE PROCESS BY REQUIRING THE JURY, WHOSE SOLE PURPOSE IS TO RECOMMEND LIFE OR DEATH TO THE JUDGE, WHOSE ROLE IS ACTUALLY TO DECIDE THE SENTENCE, TO CONSIDER THE EXISTENCE OF STATUTORY AGGRAVATING CIRCUMSTANCES AND THE EXISTENCE OF MITIGATING CIRCUMSTANCES, AND THE EFFECT OF THE LATTER AGAINST THE FORMER, WITHOUT HAVING TO REPORT ITS FINDINGS IN THIS REGARD TO THE JUDGE, AND THEN BY FAILING TO REQUIRE THE JUDGE---WHERE THE JURY RECOMMENDS THE DEATH PENALTY---TO SET FORTH IN HIS JUDGMENT AND SENTENCE WHAT WEIGHT HE GIVES TO THE JURY'S SAID RECOMMENDATION OF DEATH.

The imposition of the death penalty may not be based on a procedure that allows the sentencer to exercise his power in an arbitrary manner. This principle is precisely what the landmark case in the death penalty area, to-wit: Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972), is all about.

That principle is also what the decision in Gregg v. Georgia, 428 U.S. 153, 49 L.Ed 2d 859, 96 S.Ct. 2909 (1976), is about, in which case the U.S. Supreme Court approved a revised statutory sentencing procedure that provided objective standards aimed at eliminating arbitrariness from the process.

And the accomplishment of this principle of achieving a fair, objective, and non-arbitrary procedure is very clearly the why and the wherefore of the technique used by Florida and many

other states of having those involved in the sentencing process consider the presence of, and the weight to be given, so-called aggravating and mitigating circumstances.

And, in this regard, Florida's statutory scheme, which is set forth in Section 921.141, Florida Statutes, requires that both the jury -- which makes a life or death recommendation-- and the judge -- who does the actual sentencing -- to determine whether sufficient aggravating circumstances exist to make the defendant death eligible, and then whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances.

However, after the point of making this determination with respect to aggravating and mitigating circumstances is passed, the requirements imposed by Section 921.141, respectively, upon the jury and the judge are vastly different in that the jury need only base its recommending verdict "based upon" its consideration of the aggravating and mitigating factors, while the judge is required to set forth with specificity written findings of fact based upon its determinations with reference to such factors "and upon the records of the trial and the sentencing proceedings." As a matter of fact, the Legislature was so insistent that the judge follow the prescribed procedure of setting forth its findings that it specifically set forth in 921.141 that, "(I)f the judge does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with Section 775.082."

Clearly, though, there is a hole in the Florida death penalty dike big enough for the Zeider Zee to pass through

because 921.141, requires nothing more from the recommending jury than a general verdict solely specifying either a life sentence (with no parole for 25 years) or death, even though the jury is statutorily required to base its recommendation on the aggravating – mitigating factors proofs. Thus, there is no way in God's green earth for the judge to know what his recommending jury's determinations were with respect to the involved claimed aggravating and mitigating circumstances.

Further, the hole in the legislative dike is made even larger by the fact that 921.141 does not contain any requirement whatsoever that the judge base his verdict on the jury's determinations with respect to the aggravating and mitigating factors, and thus in the instant case all the trial judge knew was that the jury recommended the death penalty for Casteel with reference to the death of Bessie Fisher.

No such requirement having been imposed upon the Judge by 921.141, to base either his findings as to the alleged involved aggravating and mitigating circumstances, or his verdict itself, on anything the jury did, all the trial judge in this case did in his Judgment of Sentence as to Casteel was to simply mention in passing that the jury had recommended the death penalty with reference to the death of Bessie Fisher.

Thus it was that in his said judgment and sentence, the judge -- while setting forth with specificity his findings as to aggravating and mitigating circumstances –- made no mention whatsoever as to what weight -- if any -- he gave to the jury's recommendation.

It is this defendant's contention that because of this deficiency in the reporting process from jury to judge, Section 921.141 falls short of passing constitutional muster because of the possibility that the judge may have placed weight in the jury's recommendation without saying ***so;*** indeed, he may have placed more weight in the verdict than in all of his findings as to aggravating and mitigating factors combined without his having said so. It is simply unfair in the extreme that a human being could be sentenced to death under a procedure that would allow such possible unseen arbitrariness to have been the main or a motivating factor in the judge's imposition of the death sentence.

The U.S. Supreme Court has never made it a requirement that state death penalty laws involve a jury in the process but that Court has clearly held that if a jury is ***so*** involved, its function cannot be trivialized or downplayed. Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985).

Being perfectly candid with the Court -- and there is absolutely no other way for attorneys on either side of a death penalty case to be -- the aspect of Section 921.141 now being discussed arguably does -- at least potentially -- trivialize the jury's role in that the judge would tend to not give much weight to the jury's recommendation because the recommendation does not advise as to its basis. But it is also arguable that this procedure vests too much power in the jury in that it requires the jury to recommend life or death without having to enunciate any factual or substantive reasons for so doing, with the judge

giving great weight to such verdict.

In either event, the result is the same and that is that the actual sentencer -- the judge -- can either give little or no weight to the jury's death recommendation, or alternatively, great weight, and since he is not required by the statute to discuss what weight he in fact gives the jury's recommendation there is created an element of possible arbitrariness on the part of the judge, the existence of which is violative of this defendant's Eighth Amendment right to not be subjected to cruel and unusual punishment, as well as under Article I, Section 17, Constitution of the State of Florida, the due process guarantees of the Fifth and Fourteenth Amendments and of Article I, Section 9, Constitution of the State of Florida, and the "Fair Trial" protections afforded him by the FIfth, Sixth and Fourteenth Amendments (through due process) and by Article I, Section 9, Constitution of the State of Florida. Additionally, this defendant recognizes that this Court has previously, in effect, added to the scheme set forth in 921.141, a requirement that where a majority of the jury recommends life, the judge must conclude that the facts suggesting a death sentence are so clear and convincing that virtually no reasonable person could differ but, obviously, that situation is different than the one at hand and should not be found to be an arguable basis for concluding that no similar requirement should be called for where the jury itself recommends the death penalty. See Tedder v. State, 322 So.2d 908 (1975), and Thompson v. State, 328 So.2d 1 (1976).

And, finally, the defendant would state to the Court that

the fact that the United States Supreme Court upheld the constitutional validity of Florida's said statutory scheme in Proffitt v. Florida, 428 U.S. 242, 49 L.Ed 2d 913, 96 S.Ct. 2960 (1976), as not depriving a defendant sentenced thereunder to cruel and unusual punishment under the Eighth and Fourteenth Amendments to the U. S. Constitution, is not governing here since the point being raised here was not raised there.

For these further reasons, Defendant Dee Dyne Casteel prays the Court to enter its order reversing the sentence of death imposed upon her by the Court.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the defendant respectfully urges this Court to reverse and vacate the death sentence imposed upon her by the Court below and to grant her such other relief as it deems necessary, just and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was mailed this 19th day of January, 1989, to CHARLES M. FAHLBUSCH, Assistant Attorney General, Suite N-921, 401 N.W. 2nd Avenue, Miami, Florida 33128; SHERYL J. LOWENTHAL, ESQ., Attorney for Michael Irvine, Suite 304, 2550 Douglas Road, Coral Gables, Florida 33134; GEOFFREY C. FLECK, ESQ., Suite 106, Sunset Station Plaza, 5975 Sunset Drive, South Miami, Florida 33143; GARY W. POLLACK, ESQ., Suite 275, 1320 South Dixie Highway, Coral Gables, Florida 33146.

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