

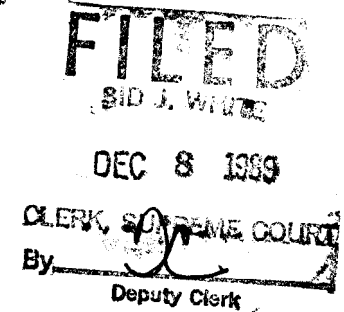
IN THE SUPREME COURT OF FLORIDA

DOMINICK OCCHICONE,
Appellant,

vs.

Case No. 71,505

STATE OF FLORIDA,
Appellee.



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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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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 with the following clarification.

Of the four mental health experts who testified during the penalty trial, one, Dr. Alfred Fireman, was a defense retained expert. (R1438) Drs. Szabo and Mussenden were appointed by the court to examine Occhicone pursuant to Fla.R. Crim.P. 3.216(d). (R1443) Dr. DelBeato was court-appointed pursuant to Fla.R.Crim.P. 3.216(a) as a confidential expert for the defense. (R1444)

SUMMARY OF ARGUMENT

Appellant properly preserved his objection to the prosecutor's opening statement by a timely motion for mistrial. There is no procedural default. On the merits, Appellee's authority is readily distinguishable from the facts at bar.

The cases cited by Appellee where this Court approved application of the cold, calculated and premeditated aggravating circumstance are readily distinguishable from the facts at bar. The record at bar shows an alcohol-influenced, hot-blooded outburst of shooting, not a careful, methodical, prearranged plan to kill.

Contrary to Appellee's assertion, Appellant is not seeking extension of the doctrine of Tedder v. State, 322 So.2d 908 (Fla. 1975). Tedder applies only when the penalty jury recommends a life sentence. However, a death sentence approved on the basis that the jury voted 7-5 for death instead of 6-6 for life would be arbitrary in violation of the Eighth Amendment.

Appellee has failed to cite even a single decision where this Court has found a death sentence proportionate under similar facts. On the other hand, there are several decisions holding that murders which result from "passionate obsession" do not warrant the death penalty.

The trial judge plainly ruled that the photographs of Appellant's son were irrelevant and inadmissible. Appellee's assertion that Appellant could have introduced a single photograph had he chosen to do so is rebutted by the record.

A recent federal decision holds that failure to instruct the jury on the elements of a felony which is used as an aggravating circumstance in support of a death sentence violates the Eighth Amendment. An uninstructed jury cannot be assumed to know all of the elements of burglary as defined by the Florida Legislature. Consequently an uninstructed jury cannot find proof beyond a reasonable doubt of these elements.

It was error for the trial court to instruct the jury on the especially heinous, atrocious or cruel aggravating circumstance because the instruction may have contributed to the jury death recommendation. Given the 7-5 penalty recommendation,

if even a single juror gave weight to this inapplicable
aggravating factor, it may have prevented a life recommendation.
The requirement of reliability in capital sentencing was not met.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN OVERRULING
APPELLANT'S OBJECTION TO THE
PROSECUTOR'S COMMENTS DURING
OPENING STATEMENT WHICH ANTICIPATED
TESTIMONY FROM WITNESSES WHO WERE
NEVER CALLED DURING TRIAL.

Appellee's brief maintains that the issue is not preserved for appellate review because defense counsel never moved for a mistrial. Brief of Appellee, p. 14, 15. In fact, counsel renewed his objection to the prosecutor's opening statement (R650) and included this issue in his motion for mistrial on cumulative error grounds. (R854, 857)

It was appropriate to move for mistrial after the close of all evidence because it became clear at that time that the prosecutor's anticipation of the defense case was invalid. As Appellee recognizes, a motion for mistrial is premature when a possibility remains that the evidence will develop as outlined in the opening statement. Brief of Appellee, p. 15; Ricardo v. State, 481 So.2d 1296 (Fla. 3d DCA), rev. den., 494 So.2d 1152 (Fla. 1986). There is no procedural default.

The State's lone authority for the proposition that the prosecutor's opening remarks were not error is readily distinguishable. In Travieso v. State, 480 So.2d 100 (Fla. 4th DCA), rev. den. sub nom Perez v. State, 491 So.2d 280 (Fla. 1986), the opening statements anticipated that an individual directly involved as a participant in the events would be called to

testify. This is completely different from the situation at bar where the prosecutor outlined a possible insanity defense and his rebuttal to it. Appellee has not shown any authority which approves the prosecutor's failure to confine his opening statement to an outline of what the State could legitimately present as evidence in their case. When the prosecutor tries to coerce the defense to present evidence or otherwise prejudices the defendant by speculating on facts or opinions not in evidence, reversible error occurs.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR MISTRIAL (BASED UPON A COURTROOM SPECTATOR'S EXPRESSION OF HER OPINION THAT APPELLANT WAS GUILTY IN THE HEARING OF PROSPECTIVE JURORS) WITHOUT CONDUCTING AN INQUIRY INTO WHETHER APPELLANT WAS PREJUDICED.

ISSUE III

WHEN THE PROSECUTOR COMMENTED DURING CLOSING ARGUMENT ABOUT APPELLANT'S REFUSAL TO TAKE AN ATOMIC ABSORPTION TEST, THE MOTION FOR MISTRIAL SHOULD HAVE BEEN GRANTED.

ISSUE IV

THE TRIAL COURT ERRED BY FAILING TO INFORM APPELLANT OF HIS RIGHT TO TESTIFY DURING THE GUILT OR INNOCENCE PHASE OF HIS TRIAL AND FAILING TO SECURE AN ON-THE-RECORD PERSONAL WAIVER OF THIS FUNDAMENTAL RIGHT.

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

ISSUE V

THE SENTENCING JUDGE ERRONEOUSLY
FOUND THE AGGRAVATING CIRCUMSTANCE
COLD, CALCULATED AND PREMEDITATED
[§ 921.141(5)(i)] APPLICABLE TO
THIS HOMICIDE.

Appellee's brief relies heavily on details which supported the cold, calculated and premeditated aggravating circumstance within the context of the cited cases, but which are unconvincing given the facts at bar. For instance, Appellee mentions "advance procurement of a weapon." Brief of Appellee, p. 30. This in itself can never be sufficient proof of the CCP aggravating factor or else all armed robberies which resulted in murder would also satisfy this aggravating circumstance.

The cases cited by Appellee, Lamb v. State, 532 So.2d 1051 (Fla. 1988) and Huff v. State, 495 So.2d 145 (Fla. 1986), present entirely different contexts from the case at bar. In Lamb, bringing a weapon to the victim's residence was some evidence that the defendant did not merely intend to steal items from the victim's house when he burglarized it. More compelling evidence of heightened premeditation was provided by the fact that Lamb remained in the victim's house awaiting his return with the prearranged plan to beat the victim's head in with a hammer. 532 So.2d at 1053.

Huff also shows procurement of a weapon within the context of a careful plan. The defendant knew that he would be riding with his parents in their car on the day of the homicides. He brought the murder weapon with him and used it once they

arrived at his chosen location. 495 So.2d at 153.

By contrast, in the case at bar the cold and calculated aspects of Lamb and Huff are not present. Occhicone was certainly hot-blooded when he brought his pistol to the Artzner residence. There is no showing that he had concocted a scheme to lure the Artzners into a situation where he could shoot them without detection. He may have intended to commit suicide or to use the gun as a threat. (R1069, 1279) He was involved in a loud altercation with Mr. Artzner before the shooting started.

Similarly, in the case at bar, prior threats to the victims are not as probative of the aggravating circumstance as they might be in a different context. Threats are often accompanied by or followed by a carefully devised plan. Thus in Dufour v. State, 495 So.2d 154 (Fla. 1986), cert. den., 479 U.S. 1101 (1987) (cited in Appellee's brief at p. 30), the defendant announced his plan to pick up a homosexual to rob and kill. He had his former girlfriend drop him off at a bar where he located a victim. He accomplished his plan by luring the victim to an orange grove where the victim was shot, execution-style, in the head. 495 So.2d at 156, 164.

At bar, however, Occhicone's threats to shoot Anita and her family were basically drunken expressions of hostility. There is no evidence of any carefully worked out plan which is essential to the heightened premeditation and calculation required by the § 921.141(5)(i) aggravating circumstance.

In Amoros v. State, 531 So.2d 1261 (Fla. 1988), the

defendant threatened his former girlfriend. The next evening, Amoros showed up at her apartment, armed with a pistol, and proceeded to shoot her new boyfriend. On these facts, this Court rejected the trial court finding of CCP:

there was an insufficient showing in this record of the necessary heightened premeditation, calculation, or planning required to establish this aggravating circumstance. 531 So.2d at 1261.

Consistent with Amoros, this Court should now strike the cold, calculated and premeditated aggravating circumstance in the case at bar.

ISSUE VI

A SENTENCE OF DEATH IS A DISPROPORTIONATE PENALTY FOR THIS HOMICIDE.

Appellee has misinterpreted Appellant's argument with regard to the significance of a 7-5 jury recommendation of death. Appellant is not requesting "any further irrational extension" of Tedder v. State, 322 So.2d 908 (Fla. 1975). Brief of Appellee, p. 33. Because Tedder is premised on jury recommendations of life, it is manifestly inapplicable to the case at bar.

Appellant's position on a 7-5 jury vote is grounded in the Eighth Amendment requirement that capital punishment not be arbitrary. There must be a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, 446 U.S. 420 at 433 (1980) The vote of one juror which distinguishes a 7-5 death

recommendation from a 6-6 tie vote jury life recommendation is not a "principled" distinction. Accordingly, where borderline jury recommendations are involved, there must be clear and convincing reasons why death rather than life is the appropriate sentence.

At bar, neither the sentencing judge nor the State has presented clear and convincing reasons why death is the appropriate punishment. Although Appellee writes:

If a death sentence supported by a death recommendation and multiple aggravating factors including heightened premeditation may not stand under this Court's disproportionality analysis, it is doubtful that any capital sentence can stand. Brief of Appellee, p. 34.

No proportionality decisions whatsoever of this Court are cited for the contention that death is the correct penalty at bar.

In Issue V, Appellant explained why the cold, calculated and premeditated aggravating circumstance does not apply. Even if this Court disagrees with our claim, it does not follow that death is the proper sentence. In Irizarry v. State, 496 So.2d 822 (Fla. 1986), circumstantial evidence showed that the defendant planned the murder of his former wife and her new lover to take place at a time when he would have an alibi. The sentencing judge found that the cold, calculated and premeditated aggravating factor was applicable.

On appeal, this Court did not address Irizarry's contention that the aggravator was improperly found because the

murder was not cold. Rather, Irizarry's sentence was simply reduced to life imprisonment. Although the Irizarry holding was based in part on Tedder, this Court also noted that "life imprisonment is consistent with cases involving similar circumstances [passionate obsession]." 496 So.2d at 825.

In accord with such decisions as Irizarry; Kampf v. State, 371 So.2d 1007 (Fla. 1979); and Amoros v. State, 531 So.2d 1261 (Fla. 1988), murders which result from passionate obsession do not warrant the death penalty even when some planning is involved. Occhicone's sentence should likewise be reduced to life imprisonment.

ISSUE VII

THE TRIAL COURT ERRED BY PERMITTING FOUR POLICE OFFICERS TO GIVE THEIR OPINIONS ABOUT APPELLANT'S LEVEL OF INTOXICATION BECAUSE THE OFFICERS DID NOT OBSERVE HIM UNTIL SEVERAL HOURS AFTER THE SHOOTINGS.

ISSUE VIII

APPELLANT'S PENALTY TRIAL WAS UNFAIR BECAUSE THE PROSECUTOR WAS PERMITTED TO INSINUATE REPEATEDLY ON CROSS-EXAMINATION THAT APPELLANT HAD A MORE EXTENSIVE CRIMINAL RECORD.

ISSUE IX

THE TRIAL COURT ERRED BY FAILING TO STRIKE TESTIMONY FROM OFFICER STONER WHICH RELATED DETAILS OF A FELONY FOR WHICH APPELLANT HAD BEEN TRIED AND ACQUITTED.

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

ISSUE X

THE TRIAL COURT IMPROPERLY
RESTRICTED APPELLANT'S RIGHT TO
PRESENT MITIGATING EVIDENCE WHEN
PHOTOGRAPHS OF APPELLANT'S SON WERE
DENIED ADMISSION INTO EVIDENCE.

Appellee's brief contends that Appellant could have chosen to introduce into evidence one of the four photographs of his son that he offered. Brief of Appellee, p. 45, 46, 47. This contention is simply inaccurate.

Initially, the prosecutor did object that four photographs were cumulative and that one was "sufficient." (R1226) However, he followed up with a further objection that any photograph was irrelevant. (R1227) The prosecutor contended:

We're talking about the relevance
of a photograph depicting his
child, and that is not relevant.

(R1228)

The court specifically sustained the objection on relevancy grounds. (R1228, 1230)

In light of this ruling, Appellee's assertion that "the decision to not introduce any of the photographs was appellant's" (Brief of Appellee, p. 47) is preposterous.

ISSUE XI

THE TRIAL COURT'S PENALTY
INSTRUCTIONS TO THE JURY WERE
UNCONSTITUTIONALLY VAGUE BECAUSE
THREE OF THE AGGRAVATING FACTORS
WERE INADEQUATELY DEFINED.

a) Instruction on section 921.141(5)(d)

In Jones v. Kemp, 706 F.Supp. 1534 (N.D.Ga. 1989), the court invalidated a death sentence which rested in part upon an aggravating circumstance that the murder was committed in the course of an armed robbery. The court noted that the trial judge gave no instruction to the jury on the elements of armed robbery. This failure to instruct "permitted the jury to exercise the kind of 'open-ended discretion' invalidated in Maynard¹ and Furman²." 706 F.Supp. at 1561. The Eighth Amendment is violated when a jury is not instructed "on an essential element of a crime necessary to support a death sentence for that offense." 706 F.Supp. at 1561-2.

At bar, the trial judge's failure to instruct the jury on the elements of burglary is equally violative of the Eighth Amendment. Indeed, the Jones opinion relies heavily on a Georgia Supreme Court decision [Rivers v. State, 250 Ga. 303, 298 S.E.2d 1 (1982)] which declared that an uninstructed jury cannot rationally determine whether all of the elements of burglary have been proved beyond a reasonable doubt.

¹ Maynard v. Cartwright, 108 S.Ct. 1853 (1988).

² Furman v. Georgia, 408 U.S. 238 (1972).

b) Instruction on section 921.141(5)(h)

Appellee relies in part upon this Court's decision in Dauaherty v. Daaer, 533 So.2d 287 (Fla. 1988) which rejected the defendant's claim of error with regard to the HAC instruction because the sentencing judge did not find that aggravating circumstance. While the result in Dauaherty is clearly correct, Appellant challenges the rationale.

Daugherty had been previously convicted of numerous violent felonies, including four other murders. See, Dauaherty v. State, 419 So.2d 1067 (Fla. 1982), cert. den., 459 U.S. 1228 (1983). Any error from the section **921.141(5)(h)** aggravating circumstance instruction was clearly harmless beyond a reasonable doubt because it could not have affected the jury's penalty recommendation.

At bar, this is not true. If even a single juror chose to consider the homicide of Mrs. Artzner as especially heinous, atrocious or cruel, the weight given to this non-existent aggravating factor may have prevented a jury life recommendation. Accordingly, the Eighth Amendment standard of reliability in capital sentencing has not been met.

CONCLUSION

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

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 113 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 6th day of December, 1989.

Respectfully submitted,



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