IN THE SUPREME COURT OF FLORIDA

ANTONIO M. CARTER,)
)
Appellant,)
)
vs. CASE NO. 71,714
)
STATE OF FLORIDA,)
)
Appellee.)

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APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT APPELLANT'S DUE PROCESS RIGHT NOT TO BE TRIED WHILE INCOMPETENT WAS VIOLATED BY THE TRIAL COURT'S RULING FINDING ANTONIO CARTER TO BE COMPETENT AND DENYING DEFENSE COUNSEL'S REQUEST TO ALLOW THE GATHERING OF MORE DATA ON CARTER'S MENTAL STATUS.

Appellee bemoans the fact that Antonio Carter did not testify below. Appellee seems to be of the opinion that Carter's testimony could have been helpful in determining Carter's competency. Appellant sees no bar in the trial court questioning Carter in the ultimate determination of this issue. Such a judicial examination probably would have been helpful and certainly could not have hurt. Any additional data would have been welcome. The trial court should have shouldered this responsibility.

Appellee is satisfied that the trial court's finding that Antonio Carter was competent to stand trial is adequately supported by the sparse data collected on this issue. The undersigned counsel is not so easily placated and submits that this Court should not be either. The crux of the matter is whether or not Antonio Carter was deliberately obstructing the evaluations of his mental status, or was unable to cooperate due to his mental problems. All of the experts (save the recalcitrant Dr. Davis) agreed that insufficient data existed to completely rule out the theory that Carter was malingering. The general consensus appeared to be that a brief hospitalization could conclusively resolve this issue. Defense counsel requested such a hospitalization and the trial court responded by summarily denying Appellant's motion to declare him incompetent to stand trial. When dealing with the question of whether a man lives or dies, a two week period of hospitalization to conclusively resolve the issue of his competence seems a small price to pay.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT ANTONIO CARTER'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM WHERE THE TRIAL COURT COMPLETELY FAILED TO CONSIDER SUBSTANTIAL, COMPETENT EVIDENCE THAT CARTER SUFFERED FROM A MENTAL DEFECT AT THE TIME OF THE OFFENSE.

In light of the extensive analysis of the evidence relating to Carter's mental deficiency in the Statement of the Facts and in Point I, counsel did not think it necessary to reiterate the evidence on this issue in this particular point. Since Appellee takes exception to this omission, counsel will summarize the specific evidence that supports the argument that Carter met the criteria of the two statutory mitigating circumstances relating to his mental state. §921.141(6)(b) and (f), Fla. Stat. (1987).

Doctor Krop determined that Carter exhibited significant thought disorders manifested by extreme hostility, uncooperativeness, and irrationality. (R428) Krop also classified Antonio Carter as border-line mentally retarded. (R429-431) Doctor Krop opined from the available information that Carter suffered from an atypical paranoid disorder. (R432-433) Doctor Davis diagnosed Carter as suffering from a personality disorder of the sociopathic type. (R474-480) Doctor Barnard concluded that Carter suffered from a personality disorder, although Barnard remained uncertain about this opinion as it was based on insufficient information. (R492-493) Barnard concluded

that it was possible that Carter suffered from a mental disorder. Carter reported to Barnard that he hallucinated in the past (both auditory and visual). (R493) Barnard concluded that Carter was in the dull-normal range of intelligence. (R495) Doctor Mhatre classified Carter as suffering from border-line mental retardation. (R412)

The state contends that the most consistent finding among the experts was the diagnosis of Antonio Carter as a sociopath. *See* Appellee's brief at p.21. Appellant contends that the most consistent finding among the experts was that Carter suffered from border-line retardation. The state concedes that a majority of the experts found some evidence of Carter's reduced mental capacity, but submits that "the probative value of such evidence is significantly diminished by one expert's [Dr. Davis] unequivocal evaluation of appellant as being of average of above-average intelligence." *See* Appellee's brief at p.21. Appellee's logic is faulty in this regard since there is absolutely no evidence that the trial court considered Doctor Davis' testimony and reports or those of any of the other mental health professionals in rejecting the application of the two statutory mental mitigators. It appears that the trial court probably did not believe that he could consider the evidence presented at the competency hearing in determining the appropriateness of the death sentence.

Appellee then attacks the testimony of Debra Cox at the penalty phase indicating that she felt that Carter was not "in his right mind" at the time of the offense. (R256) Appellee

submits that the probative value of this testimony is negligible where it was not conclusively shown that the witness personally observed Carter during or in close temporal proximity to the crime. At trial, the state did not attempt to refute Cox's testimony in any way. Now, the state complains for the first time during the proceedings that this testimony is somehow deficient and is therefore entitled to little probative value. This Court should decline to entertain a claim of error which was neither advanced in, nor considered by the trial court. Grossman v. State, 525 So.2d 833, 842 (Fla. 1988) and Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984).

Appellant believes that a complete reading of the record points to the conclusion that the trial judge believed that he was under no obligation to consider the evidence regarding Carter's mental state that was presented at the competency hearing but was not presented again during either phase of the trial. The trial court simply overlooked the admittedly small amount of evidence on this issue presented through the testimony of Debra Cox and Peter Hadburg. The finding of even one of the two statutory mental mitigating circumstances could have a great effect on aggravating circumstances as well as the decision to impose the ultimate sanction. See e.g. Holsworth v. State, 522 So.2d 348 (Fla. 1988).

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT CARTER'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM IN THAT THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE APPLICABLE LAW RELATING TO THE TWO MITIGATING CIRCUMSTANCES INVOLVING CARTER'S MENTAL STATUS AT THE TIME OF THE OFFENSE.

Counsel hopes that Appellee is not suggesting that the jury instruction relating to non-statutory mitigating circumstances (sometimes referred to as the "catch-all" mitigator) renders harmless the error created when the trial court failed to instruct the jury on pertinent statutory mitigating circumstances. Appellant does not believe this would comply with the legislature's intent, otherwise, the "catch-all" mitigator would be the only mitigating circumstance on which the jury is instructed in capital cases. This Court reversed adeath sentence where the trial court erred in not instructing the jury as to more statutory mitigating circumstances. Robinson v. State, 487 So.2d 1040 (Fla. 1986).

> Robinson also put in some evidence of impaired capacity. The trial judge may not have believed it, but others might have, and it, too was adequate at least to instruct the jury on. The jury must be allowed to consider any evidence presented in mitigation, and the statutory mitigating factors help guide the jury in its consideration of a defendant's character and conduct. We therefore find that the court erred in not instructing on these two statutory mitigating circumstances. Regarding mitigating evidence and instructions, we encourage trial courts to err on the side of caution and to permit the jury to receive such, rather than being too restrictive.

Robinson, supra at 1043 (emphasis added). Presumably, the Robinson trial court's instruction regarding the "catch-all" non-statutory mitigating circumstance did not cure the error perceived by this Court.

Some evidence was presented at Carter's trial thus warranting the instructions on the two mental mitigating circumstances. See Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976). The jury instructions given in the instant case were fundamentally and constitutionally infirm. This Court must vacate Antonio Carter's death sentence and remand for a new penalty phase. See Floyd v. State, 497 So.2d 1211 (Fla. 1986).

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT ANTONIO CARTER'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM WHERE THE STATE'S DECISION TO SEEK THE ULTIMATE SANCTION WAS BASED IN LARGE PART ON IMPROPER CONSIDERATIONS CONTRARY TO THE DICTATES OF BOOTH V. MARYLAND, 482 U.S. __, 107 S.Ct. __, 96 L.Ed.2d 440 (1987).

Contrary to Appellee's assertion, Appellant does *not* concede that this particular point was not properly preserved below. Rather, Appellant submits that Carter's death sentence is fundamentally and constitutionally infirm in that improper considerations were utilized in the state's decision to seek the ultimate sanction.

Counsel also disagrees with Appellee's reference to "appellant's mischaracterization of and idle speculation regarding the circumstances surrounding the instant claim of error." *See* Appellee's brief at p.38. Appellant maintains that the record supports his contention that the state used constitutionally impermissible factors in reaching the decision to seek Carter's death sentence.

POINT XI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT ANTONIO CARTER'S DEATH SENTENCE IS UNCONSTITUTIONAL AND DISPROPORTIONATE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHERE THE EVIDENCE ESTABLISHED THAT CARTER IS MENTALLY RETARDED.

Appellant agrees with Appellee that the very least this Court should do is remand for further factual determinations regarding Antonio Carter's mental retardation.

CONCLUSION

Based upon the foregoing authorities, argument and policies, and those in his Initial Brief, Appellant respectfully requests that this Honorable Court grant the following relief:

As to Points I and VII, reverse the convictions and sentences and remand for a new trial;

As to Points II and IX, vacate the death sentence and remand for imposition of a life sentence or, at least for reconsideration of the sentence;

As to Points 111, V, VI and VIII, vacate the death sentence and remand for imposition of a life sentence, or in the alternative, for a new penalty phase;

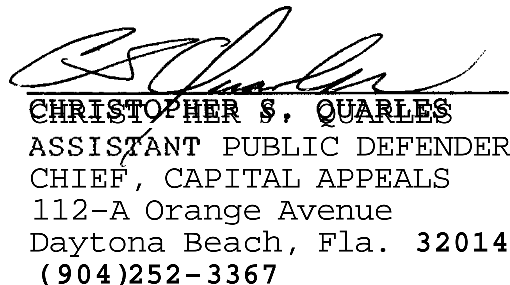
As to Point IV, vacate the death sentence and remand for imposition of a life sentence or, in the alternative, for a hearing on this issue;

As to Point X, declare Florida's death penalty statute unconstitutional or remand for the imposition of a life sentence.

As to Point XI, vacate Carter's death sentence or remand for further factual determinations regarding Antonio Carter's mental retardation.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, 4th floor, Daytona Beach, Fla. 32014 in his basket at the Fifth District Court of Appeal and mailed to Mr. Antonio Carter, #068601, P.O. Box 747, Starke, Fla. 32091 on this 4th day of November, 1988.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER