IN THE SUPREME COURT OF FLORIDA

JOHNNIE C. BOUIE, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 72,278

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
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POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT SECTION 921.141(3), FLORIDA STATUTES, VAN ROYAL V. STATE, INFRA, ITS PROGENY, AND THE FEDERAL CONSTITUTION MANDATE THAT APPELLANT'S SENTENCE BE REDUCED TO LIFE WHERE THE JUDGE FAILED TO RECITE OR TO FILE WRITTEN FINDINGS OF FACT.

The state concedes that error occurred, but seeks to eliminate the mandatory statutory requirement that death sentences be supported by specific findings of fact. The state also seeks to focus this Court's attention on the circumstances of the murder and, in doing *so,* is clearly labeling the trial court's omission to be procedural rather than the substantive breach that it actually is. The state asks this Court to ignore the statute; to ignore the procedural rule established by this Court in Grossman v. State, 525 So.2d 833 (Fla. 1988); to ignore the holding in Van Royal v. State, 497 So.2d 625 (Fla. 1986); and

wants this court to remand at this late date to the trial court for the preparation of written findings of fact in support of the death sentence. This Court declined a similar request from the state during the summer months of 1988 and should again reject the state's request.

Appellee asserts that the facts of the case at bar are more similar to those in Patterson v. State, 513 So.2d 1257 (Fla. 1987) than those in Van Royal v. State 497 So.2d 625 (Fla. 1986). Appellee considers the Van Royal jury recommendation of life to be absolutely critical. Appellee further contends that Bouie's death recommendation should result in a disposition identical to Patterson whose jury recommended death. The state's focus on the jury's recommendation is not supported by this Court's analysis of this issue in its previous decisions. In fact, the jury's penalty recommendations played no part in this Court's examination of this issue. See e.g. Grossman v. State, 525 So.2d 833 (Fla. 1988); Patterson v. State, 513 So.2d 1257 (Fla. 1987); Nibert v. State, 508 So.2d 1 (Fla. 1987); Meuhlmann v. State, 503 So.2d 310 (Fla. 1987); Van Royal v. State, 497 So.2d 625 (Fla. 1986); Cave v. State, 445 So.2d 341 (Fla. 1984); and Ferguson v. State, 417 So.2d 639 (Fla. 1982).

In spite of Appellee's assertions to the contrary, even a brief inspection of the cases reveals the facts of the instant case to be much closer to those in Van Royal than to the facts in Patterson. The Patterson trial judge signed an order prepared by the state attorney that set forth three aggravating circumstances. The Van Royal trial judge failed to orally recite the findings on

which he based the death sentences and also failed to file any written findings of fact until approximately five weeks after the record on appeal was filed with this Court. (And then only when the trial court became aware of its omission as a result of appellate counsel filing a motion to transfer the appeal to the district court). In Patterson, this Court concluded that Van Royal did not require the imposition of a life sentence, since the trial court rendered an erroneous sentencing order as part of the record on appeal rather than no sentencing order at all. That distinction was the focus of this Court in Patterson. The jury's recommendation played no part in this Court's discussion of the issue.

Bouie's trial court did not file an erroneous sentencing order. The court filed no sentencing order at all. The court also failed to orally cite any findings of fact in support of the death sentence. The trial court has yet to enter written findings of fact in support of the death sentence imposed. The Van Royal trial judge ultimately attempted to file written findings of fact, but only after the record on appeal had been certified to this Court. It is abundantly clear that the facts of this case are much more analogous to those in Van Royal than in Patterson. Appellee's assertion that:

> The only distinction between Patterson and the instant case is that the trial court in that case delegated to the state attorney the responsibility of identifying the aggravating and mitigating factors.

See Answer Brief, pp. 15-16. The above statement is a bald misstatement of fact. In Patterson, a written order was rendered

and signed by the trial court. In the instant case no such order was ever rendered, and such a distinction is absolutely critical under the statute and this Court's holding in Van Royal.

Appellee concludes her discussion by urging this Court to remand to the trial court for a new sentencing proceeding. Appellee attempts to label the trial court's omission as a mere procedural oversight that can easily be rectified if this Court remands to allow the trial judge to enter written findings of fact in support of the death sentence at this late stage in the proceedings. In formulating that argument, Appellee conveniently overlooks the mandatory statutory requirement that death sentences be supported by specific findings of fact. Section 921.141(3), Florida Statutes (1987). This Court recognized the mandatory nature of the requirement in Van Royal, 497 So.2d at 628.

Appellee also points out numerous situations where, reversible error having occurred, this Court remands with instructions to the trial court to cure the error. The situations listed by Appellee in the Answer Brief result in a new trial, a new penalty phase, a reconsideration of the sentence, or a new sentencing proceeding before the judge. See Answer Brief, pp.19-20. The state then urges this Court to remand so that the trial court can now conduct a meaningful weighing process and to subsequently render written findings of fact in support of the death sentence imposed. The state argues that this Court's role in reviewing death cases is that of sentence review, not sentence imposition. See Answer Brief at page 17. Appellee conveniently overlooks the numerous situations in which this Court has found

the death sentence imposed by the trial judge to be inappropriate and ordered that a life sentence be imposed. See e.g., Harmon v. State, 527 So.2d 182 (Fla. 1988); Proffitt v. State, 510 So.2d 896 (Fla. 1987); Wilson v. State, 493 So.2d 1019 (Fla. 1986); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Ross v. State, 474 So.2d 1170 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Welty v. State, 402 So.2d 1159 (Fla. 1981); and Halliwell v. State, 323 So.2d 557 (Fla. 1975).

Appellee also incorrectly states, "When the trial court errs during trial to the prejudice of the defendant, this Court remands for a new trial, and does not simply set the defendant free." See Appellee's brief at page 19. This Court is well aware of cases involving certain types of issues, speedy trial for example, where the defendant is in fact set free based on an erroneous ruling by the trial court below.

The action of the trial judge in the instant case substantively violates Section 921.141, Florida Statutes (1987). The sentencing judge has yet to articulate, written, oral, or otherwise, his findings as to any of the aggravating and mitigating circumstances. Since this Court cannot assure itself that the trial judge based the oral sentence on a well-reasoned application of the factors set out in Section 921.141(5) and (6) the sentence is unsupported. Under Section 921.141(3), and Van Royal this Court must vacate Bouie's death sentence and remand for imposition of a life sentence.

POINT IV

APPELLANT HEREBY WITHDRAWS AND ABANDONS THIS PARTICULAR POINT FOR CONSIDERATION BY THIS COURT AND SPECIFICALLY WAIVES THIS POINT ON APPEAL.

Appellant, by and through his undersigned counsel, hereby withdraws and abandons this particular point on appeal. Appellant does not wish any relief as to this point and specifically waives any reliance on this point and the argument therein.

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT JOHNNIE BOUIE'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM WHERE THE STATE, THE TRIAL COURT, AND THE JURY INSTRUCTIONS DIMINISHED THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS CONTRARY TO CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985).

This Court has recently implied that Eighth Amendment violations can and should be raised by appellate counsel for the first time on appeal. See Atkins v. Dugger, 14 FLW 207 (Fla. April 13, 1989).

CONCLUSION

Based on the foregoing cases, arguments and authorites, and those in the Initial Brief, the Appellant respectfully requests this Court to grant the following relief:

Initially, this Court should vacate Johnnie Bouie's illegally imposed death sentence and impose a life sentence. Pursuant to Section 921.141(3), Florida Statutes (1987) Bouie must be sentenced to life regardless of this Court's treatment of the other issues raised herein.

As for the other points raised by Bouie, this Court should vacate Bouie's conviction and remand for a new trial as to Points 11 and V. As for Point III, this Court should vacate Bouie's conviction and remand for discharge. At the very least, this Court should remand for a new trial in the interest of justice.

This Court need not reach the merits of Points VI, and VII in light of Point I.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished through U.S. mail to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, fourth floor, Daytona Beach, Florida **32014** and to Mr. Johnnie **C.** Bouie, Jr., **#111099,** P.O. Box **747,** Starke, Fla. **32091** on this 28th day of April, 1989.

CHRISTOPH S. QUARLES
ASSISTANT PUBLIC DEFENDER