

IN THE SUPREME COURT OF FLORIDA

GEORGE PORTER, )  
 )  
 Defendant/Appellant, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Plaintiff/Appellee. )  
 \_\_\_\_\_ )

CASE NO. 72,301

**FILED**  
SID J. WHITE

**APR 5 1989**

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By  Deputy Clerk

APPEAL FROM THE CIRCUIT COURT  
IN AND FOR BREVARD COUNTY  
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN IMPOSING THE DEATH SENTENCE IN PART UPON A FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

A. SECTION 921.141 (5)(h), FLORIDA STATUTES (1987) IS UNCONSTITUTIONALLY VAGUE.

The state has offered two counterarguments to this issue. The first counterargument is the all-too familiar "not preserved for appellate review" due to a lack of objection at the trial level. However, as noted in the initial brief, the argument is without merit. The error alleged is a sentencing error apparent from the face of the record and therefore not subject to the contemporaneous objection rule. State v. Whitfield, 487 So.2d 1045 (Fla. 1986).

The state's second counterargument is that the logic of Maynard v. Cartwright, 486 U.S. \_\_\_, 108 S.Ct. 1853, 100 L.Ed,2d 372 (1988) is inapplicable because in Oklahoma, the jury is the actual "sentencer" while in Florida, the jury's role is only advisory. This argument is blatantly fallacious. The Florida legislature has devised a tripartite capital sentencing procedure to promote reliability and proportionality in the decision to exact the ultimate penalty. Section 921.141, Florida Statutes (1987). Under this tripartite system, the trial jury, the trial judge and this Court are charged with the responsibility of independently weighing the evidence in aggravation and mitigation to determine whether the imposition of the ultimate penalty is necessary. Proffitt v. Florida, 428 U.S. 242, 251-9, 96 S.Ct. 2960, 49 L.Ed,2d 913 (1976); State v. Dixon, 283 So,2d 1, 7-8 (Fla. 1973).

The first tier of the sentencing decision-making process, the trial jury, is of particular significance under Florida law, for jurors interpose the contemporary community values in the death sentencing resolution. Cooper v. State, 336 So,2d 1133, 1140 (Fla. 1976). In recognition of the important role played by the jury in sentencing, this Court has commanded that trial judges must give great weight to the recommendation of the advisory jury. Thompson v. State, 328 So,2d 1 (Fla. 1976); Tedder v. State, 322 So,2d 908 (Fla. 1975). Consequently, the state's attempt to distinguish Maynard v. Cartwright, supra cannot be sustained. To do so would denigrate the importance of the jury's role in the sentencing procedure.

While Appellant does not agree that he is procedurally barred from raising this constitutional attack, he joins the state in requesting that this Court fashion an appropriate instruction on heinous, atrocious and cruel to aid the jury in making its recommendation.

B. THE EVIDENCE DOES NOT PROVE BEYOND A REASONABLE DOUBT THAT THE KILLING OF EVELYN WILLIAMS WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

In support of this aggravating circumstance, the state strains the bounds of logic and the law. The state points to events which occurred several months before Evelyn Williams was killed including tire slashing, ramming her car with his own, smashing car windows and death threats to her and her daughter. It is simply illogical to say that these acts are part of the actual act of killing. This is particularly true when Appellant was not even residing in the State of Florida for a period of months between these alleged acts and the killing. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) clearly states that for heinous, atrocious and cruel to apply "the actual commission of the capital felony [must be] accompanied by such additional acts as to set the crime apart from the norm of capital felonies." (emphasis added).

Additionally, there is no record support for the state's bald assertion that Appellant "watched her crawl for her life from room to room" or that "he cornered her in her den" or that "he stood over her as she pleaded 'Oh my God' and shot her" or that "he caused her a slow and agonizing death over as much as ten minutes." [Brief of Appellee at page 20]. Indeed, the state

has offered no record citations to support these assertions. The state's attempt to distinguish the cases cited in the initial brief is unpersuasive. In Teffeteller v. State, 439 So.2d 840 (Fla. 1983) this Court struck a finding of heinous, atrocious and cruel where the victim suffered a shotgun blast to the abdomen, lived for several hours in undoubted pain and knew he was going to die. In Rembert v. State, 445 So.2d 337 (Fla. 1984) this Court again struck a finding of heinous, atrocious and cruel where the victim was beaten with a club one to seven times but lives for several hours and remained conscious. The instant case does not meet the test for the proper application of heinous, atrocious and cruel. It must be struck.

CONCLUSION

Based on the foregoing reasons and authority and those in the initial brief, Appellant respectfully requests this Honorable Court to grant the following relief:

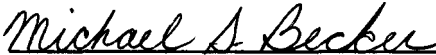
As to Points I through V, reverse Appellant's judgments and sentences and remand for a new trial.

As to Points VI and VII, vacate the death sentence and remand for a new penalty phase before a newly empanelled jury.

As to Points VIII and IX, vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

JAMES B. GIBSON  
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ATTORNEY FOR APPELLANT



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Fla. 32399-1050, and to Mr. George Porter, #110825, P.O. Box 747, Starke, Fla. 32091 on this 4th day of April 1989.

  
MICHAEL S. BECKER  
ASSISTANT PUBLIC DEFENDER