IN THE SUPREME COURT OF FLORIDA

BERNELL HEGWOOD,

Appellant/Defendant,

vs.

STATE OF FLORIDA,

Appellee/Plaintiff.
_____/

72336

CASE NO. ~~92,336~~
Circuit No. 87-10559CF

APPELLANT'S REPLY BRIEF

A Death Penalty Appeal from the Circuit Court of the Seventeenth Judicial Circuit, Honorable Thomas M. Coker, Jr.

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POINT 1

THE SUPPRESSION OF, OR UNTIMELY DISCLOSURE OF BRADY EVIDENCE DENIED THE APPELLANT A FAIR TRIAL.

The State infers that Nelly Burgess' testimony was not Brady evidence. Brady evidence is material which tends to be exculpatory, or material which may be used to impeach or discredit the prosecution's witnesses. Burgess' testimony that at a time contemporaneous with the robbery/murders she saw two men, neither of which was Bernell, running from the direction of the restaurant carrying a bag and guns would certainly be exculpatory.

The proper standard for determining a Brady violation is whether there is a reasonable probability that the result would have been different. The term reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. Waterhouse v. State, 522 So.2d 341 (Fla. 1988). Burgess is a federal law enforcement officer. Her testimony that two armed men, neither of which was Bernell, is of the magnitude, such that there is a reasonable probability that the result would have been different. This is amply demonstrated by the jury's recommendation of three life sentences. Notwithstanding the fact that the jury convicted Bernell of a triple homicide, that same jury upon hearing Burgess' testimony recommended three life sentences.

The State's alternate argument is that Burgess' testimony was merely relevant evidence that had to be timely disclosed. The

State argues that Burgess' testimony was timely disclosed such that defense counsel could have utilized the evidence in the guilt phase had he been more diligent. The State's assertion is based upon the fact that defense counsel was informed of Burgess' testimony at approximately 10:00 a.m., Monday, February 8, 1987, just prior to presentation of the State's rebuttal witnesses. There is ample evidence to suggest the police dragged their feet in pursuing and disclosing Burgess' testimony. The evidence suggests that when they informed defense counsel of Burgess' testimony at the eleventh hour, they misled defense counsel as to the significance and/or quality of her testimony.

When Burgess telephoned that Friday afternoon, the trial was coming to a conclusion. The State had rested its case-in-chief, and defense counsel was presenting his witnesses. Burgess' telephone call was directed to Detective Wally, the lead investigator who had presented all of Bernell's recorded and unrecorded statements to the jury. When Burgess did not immediately and positively identify Bernell as one of the two armed men she had seen running from the direction of the restaurant, Wally was in no hurry to have her view a line-up. Notwithstanding the fact that she was a trained law enforcement officer. Rather, Wally waited until Saturday evening to get back in touch with her. Instead of travelling to her for a more detailed sworn statement and photographic line-up, Wally merely scheduled her an appointment the next day, Sunday, with another detective. Query: If she had positively and unequivocally

identified Bernell, would Wally have driven to the federal prison in Miami to interview her and have her view a photographic line-up?

Sunday, Detective Williams took a taped statement and had her view a photographic line-up. She knew that photograph number five was Bernell from television news reports. Using his picture as a reference she stated that one of the men looked similar to him, except his hair was knotty, he had a darker complexion and he was very dirty. Using Bernell's photograph for a comparison is far different than a positive identification.

At this juncture, both Wally and Williams, knew that Burgess' description did not match Bernell. The State Attorney directed them to inform defense counsel about Burgess' testimony. Williams gave defense counsel Burgess' name and telephone number adding that she was 98% sure one of the two armed men she saw running from the direction of the restaurant was Bernell. Based upon this representation, considering that the State had rested its case-in-chief and the defense had rested its case, what prudent defense counsel would have rushed to contact Burgess to hear her inculpatory evidence?

The State suggests that Burgess' testimony was timely disclosed. Thus, if the jury did not hear her testimony in the guilt phase, it was defense counsel's fault. First, defense counsel was misled about the significance and quality of Burgess' testimony. To the contrary, defense counsel acted promptly when he was provided the accurate information. Defense counsel's

actions must be reviewed within the context in which it occurred. Bernell was defended by a court appointed solo practitioner whose office staff consisted of a shared secretary. In contrast to the State Attorney, who had a full-time investigator sitting with him at trial and who had the services of Detectives Wally and Williams. It was David versus Goliath.

Defense counsel was first made aware of Burgess only minutes before the State began its presentation of eight rebuttal witnesses. When the State's rebuttal testimony was concluded, the jury was given a lunch recess in the jury room, while defense counsel and the prosecutor took up legal matters outside the presence of the jury. The court took a short recess, and then reconvened to conclude the jury instruction conference. At the conclusion of the jury instruction conference, closing arguments began. Immediately after closing arguments, the court instructed the jury and they retired to deliberate.

During the middle of closing argument, defense counsel was given a transcript of Burgess' statement. Defense counsel was trying the case alone. Should he have been expected to read and analyze her statement during a crucial stage, such as closing argument. Would it be reasonable to believe defense counsel would read Burgess' statement during closing argument when he was under the misconception that her testimony was inculpatory?

When defense counsel was given a transcript of Burgess' statement, closing argument was not yet complete. Remember, immediately upon conclusion of closing arguments, the Court

instructed the jury and they retired to deliberate. (Volume 13, p. 2284-2285, 2292-2390, 2394-2400; Volume 14, p. 2401-2429)

A first degree murder trial is an intense tiring endeavor. After having time to catch his breath and recharge his battery, defense counsel read Burgess' transcribed statement, the primary document that would reveal the detective's misrepresentations. Having read Burgess' statement and realizing that he had been snookered, defense counsel requested a Richardson hearing to determine why this favorable evidence had not been timely disclosed. Acting prudently, the court wanted to hear from the alleged culprits, Detectives Wally and Williams. While awaiting their arrival, the jury arrived at its verdict.

Without question, the police were dilatory in disclosing exculpatory evidence. The blame rests squarely on the police.

POINT 2

THE COURT SHOULD HAVE GRANTED A MISTRIAL, OR IN THE ALTERNATIVE A NEW TRIAL SO THE JURY COULD CONSIDER THE EXCULPATORY NATURE OF BURGESS' TESTIMONY IN THE GUILT PHASE.

The State argues that the court properly denied the Motion for New Trial, because the new evidence was not discovered after trial. With due diligence defense counsel could have presented it at trial. Before trial, no amount of diligence by defense counsel could have produced Burgess' testimony. Burgess' testimony was only going to come to light at that point in time when her

conscience dictated that she make the evidence known. Absent Burgess voluntarily stepping into the spotlight, her testimony would have forever remained a secret.

The mere disclosure of Burgess' name and telephone number minutes before the State was going to begin presenting eight rebuttal witnesses does not render the evidence "discovered". Remember, Detective Williams led defense counsel to believe that Burgess' testimony was damning to his client. Defense counsel was not presented a transcript of Burgess' testimony, a primary document that would reveal Detective Williams' misrepresentations, until the middle of closing arguments. Immediately at the conclusion of closing arguments, the jury was instructed and then retired to deliberate. The State argues that the evidence was not "new" because it laid the package on defense counsel's desk during a crucial stage. That because defense counsel did not read the statement, a statement he was led to believe was extremely inculpatory, that the jury's failure to hear the evidence during the guilt phase is the fault of defense counsel. Query: A delivers B a package, which he represents contains books that B has ordered, in reality the package contains a bomb. The bomb blows up killing A. Is A to be faulted for not opening the package because he was lulled into believing it contained books?

The <u>exculpatory</u> nature of Burgess' testimony was not discovered until <u>after</u> trial. Realistically, defense counsel did not have an opportunity to read and digest Burgess' statement until after the jury had retired to deliberate. When the

exculpatory nature of her testimony became apparent, defense counsel immediately sought curative action. In response thereto, the court wanted a clear picture of Burgess' testimony and the facts surrounding its disclosure or non-disclosure. Before that could be accomplished the jury returned a verdict. The "timeliness" argument should be rejected if for no other reason than that the ends of justice require that a jury hear Burgess' testimony in the guilt phase before Bernell may be convicted and imprisoned for life or sentenced to death.

POINT 3

THE JURY RECOMMENDED A LIFE SENTENCE AS TO EACH COUNT OF FIRST DEGREE MURDER. THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION AND IMPOSING THE DEATH PENALTY.

In Cochran v. State, 14 FLW 406, decided July 27, 1989, (Fla. 1989) this Court wrote, "clearly, since 1985, the Court has determined that Tedder means precisely what it says, that the judge must concur with the jury's life recommendation unless 'the facts suggesting a sentence of death (are) so clear and convincing that virtually no reasonable persons could differ'. Tedder, 322 So.2d at 910." There was ample evidence for reasonable persons to conclude that life was an appropriate sentence.

The State argues that the mitigating factors set forth in Bernell's brief should be rejected. The State concludes that there was no evidence upon which the jury might recommend life

based upon the treatment accorded accomplices. In Bernell's first statement, he admitted being present during the robbery/murders but denied being a participant. He merely fessed up to after-the-fact taking the money that the culprits left behind. Based upon this statement, the jury may very well have concluded that Bernell was a non-trigger pulling co-conspirator, as opposed to a scavenger. In Bernell's fourth statement, he said he was at the restaurant at a time contemporaneous with the robbery/murders. However, before anything occurred, he left his mother and some unidentified persons at the restaurant. He stated that he believed his mother and brother were the perpetrators. This statement in conjunction with his third statement that Marvin had supplied him the gun, may have led the jury to conclude that Bernell, his mother, and his brother, Marvin, were co-conspirators. As such, the jury may have considered the fact that his brother and mother were never charged with the crime.

The State argues that the non-statutory mitigating circumstance set forth in Skipper v. South Carolina, 476 U.S. ____, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), relating to adaptation to incarceration is inapplicable. The State argues that the test for the application of this non-statutory mitigating circumstance is proof of rehabilitation. The United State Supreme Court did not condition applicability of this non-statutory mitigating circumstance on proof of rehabilitation. Rather, evidence that a defendant will not pose a danger if spared, but incarcerated, must be considered as a mitigating circumstance. The State argues that

this mitigating circumstance is not applicable, because there is no evidence in the record that Bernell would be any thing other than a normal prisoner. Query: What is a "normal" prisoner? The test is adaptability to incarceration without fear the offender will impose a danger to correctional personnel or other prisoners. Lieutenant Quigley's uncontradicted testimony established that Bernell was not a dangerous, violent disciplinary problem.

In conclusion, there was sufficient mitigating evidence upon which the jury should have reasonably concluded that life was an appropriate sentence.

POINT 4

THE TRIAL COURT ERRED IN HOLDING THE MURDER OF SCHMIDT WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

The State argues that the constitutional challenge to this aggravating circumstance has been put to rest by this Court's decision in Smalley v. State, 14 FLW 342, decided July 6, 1989, (Fla. 1989). Counsel acknowledges the Smalley decision without conceding that it is a correct result.

In holding this aggravating circumstance constitutional, this Court stated, "... this Court has continued to limit the finding of heinous, atrocious, or cruel to those consciousless or pitiless crimes which are unnecessarily torturous to the victims." Smalley v. State, supra at 343. Based on that construction, Schmidt's death was substantially similar to the fact patterns in Amoros v.

State, 531 So.2d 1256 (Fla. 1988) and Lewis v. State, 377 So.2d 640 (Fla. 1979). In Amoros, the victim made a futile attempt to save his life by running to the rear of the apartment; however, he was trapped at the back door, he was shot three times at close range. The shots were fired within a short time of each other. In Lewis, the victim was shot in the chest and several more times as he attempted to flee.

According to the State's theory, Bernell startled Schmidt in his office while he was doing the books. His plea not to be hurt was immediately followed by shots fired in succession. After the shooting, the spoils of the crime were retrieved. The evidence was consistent with Schmidt receiving the wounds in rapid succession and dying instantly.

Accordingly, Schmidt's death was not the unnecessarily torturous death contemplated in finding this aggravating circumstance. It cannot be concluded that with the elimination of this aggravating circumstance a sentence of death would have been imposed.

POINT 5

THE COURT ERRED IN FINDING THE MURDERS WERE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

The State argues that because Bernell procured a gun with which to commit the robbery coupled with the fact that Sharon Reeseman and Michael Peters were each shot in the back of the head with a single bullet causes their deaths to meet the standards of

heightened premeditation and calculation required to support this aggravating circumstance. The mere fact that a gun was used and they were shot from behind does not mean their deaths were carefully prearranged.

The State's reliance on the decisions in Dufor v. State, 495 So.2d 154 (Fla. 1986), Burr v. State, 466 So.2d 1051 (Fla. 1985), and Remeta v. State, 522 So.2d 825 (Fla. 1988) is misplaced. In Dufor, the defendant announced to his girlfriend that he was going to find a homosexual to rob and kill. He had her drive him to a particular location. Later, he rejoined her stating that he had found a homosexual, killed him and taken his car and jewelry. In Burr, the defendant had a pattern of robbing convenience stores and shooting the clerks, as evidence by the fact he did it four times in nineteen days. In Rameta, the defendant in confessing to the convenience store robbery said he, "just liked killing people" and that he "just didn't care." He went on to state, "... they ain't got no witnesses. Anytime I seen a witness, I took him out, or at least shot him." In the aforementioned cases, the pre-crime statements of the defendant, or the conduct of the defendant, or the post-arrest statements of the defendant clearly reveal that the defendant intended to kill the victim before commission of the crime or before arriving at the crime scene. The facts in the aforementioned cases evince the heightened premeditation contemplated by this aggravating circumstance.

The court erred in finding this aggravating circumstance. The court placed great emphasis on this aggravating circumstance

as evidenced by its written finding and its oral pronouncement. (Vol. 6, p. 3008) It cannot be concluded that with the elimination of this aggravating circumstance that a sentence of death would have been imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to Carolyn M. Snurkowski, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 23 day of October, 1989.

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