IN THE SUPREME COURT OF FLORIDA

EDWARD EUGENE RAGSDALE,

Appellant,

v. **Case No. 72,664**

STATE OF FLORIDA,

Appellee.

BRIEF OF THE **APPELLEE**

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STATEMENT OF THE CASE AND FACTS

Your appellee accepts the "Statement of Facts and Statement of the Case" contained with the brief of appellant at pages 5 - 24 as a substantially accurate recitation of the proceedings below.

SUMMARY OF THE ARGUMENT

As to Issue I: The trial court correctly granted a motion in limine filed by the state to prevent mention of the fact that the codefendant had entered a plea and had received a sentence of life imprisonment. This evidence is irrelevant in the guilt phase of a capital trial, and appellant concedes as much. This limitation did not, however, prevent examination of prospective jurors during voir dire as to their impressions concerning the concept of "disparate sentencing". Appellant was not deprived of his right to a fair voir dire proceeding.

As to Issue 11: The trial court validly imposed a sentence of death upon appellant based upon the weighing of aggravating and mitigating circumstances. The fact that a codefendant received a life sentence is certainly not determinative of the correct sentence appellant should receive where the codefendant had less aggravating factors and substantially more mitigating factors applicable to his case, and as found by the trial court, where appellant was the more culpable actor in the homicide.

As to Issues III - X: Appellant correctly concedes that the matters raised under these points have all been rejected previously by this Honorable Court.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY GRANTING A MOTION IN LIMINE FILED BY THE STATE TO LIMIT INTRODUCTION OF ANY EVIDENCE IN THE GUILT PHASE OF A CODEFENDANT'S PLEA OF GUILTY AND SENTENCE OF LIFE IMPRISONMENT.

As his first point on appeal, appellant contends that the trial court, by granting a motion in limine which sought to limit introduction in the guilt phase of any evidence of a codefendant's plea and sentence of life imprisonment, failed to permit appellant to question prospective jurors on voir dire with respect to their views on "disparate sentencing". For the reasons expressed below, appellant's point is without merit and must fail.

At the outset, it must be observed that the state, by filing a motion in limine, was only attempting to limit mention of the codefendant's plea and sentence in the guilt phase of trial (R 6, 903). In support of its proposition, the state relied upon the decision rendered in State v. Wilson, 483 So.2d 23 (Fla. 2nd DCA 1985), a decision which was affirmed by this Honorable Court in Wilson v. State, 520 So.2d 566 (Fla. 1988). In Wilson, the Second District held that a plea of guilty, conviction or acquittal of an accomplice is not admissible to prove the guilt or innocence of the accused. Thus, this type of evidence is irrelevant to the question of the defendant's guilt or innocence. Indeed, in his brief at page 28 appellant concedes that "such plea and sentence was indeed irrelevant and improper matter for

consideration with relation to the question of appellants guilt . . ." Thus, although acknowledging that the codefendant's conviction and sentence were irrelevant for the purposes of appellant's guilt phase, appellant nevertheless suggests that this Court should permit introduction of this type of evidence via the back door because this evidence would be admissible in a penalty phase. The trial court's ruling below had the effect of preventing inadmissible and irrelevant evidence from being presented to the jury while preserving the defendant's rights to a fair voir dire examination.

The purpose of a voir dire proceeding is to secure an impartial jury for the accused. See, Lewis v. State, 377 So.2d 640, 642 (Fla. 1979), and cases cited therein. Thus, it is perfectly permissible to explore on voir dire those biases and prejudices which may affect a defendant's right to a fair and impartial trial. This goal was not diminished by the trial court's granting of the motion in limine sub judice. The prohibition of mentioning the codefendant's conviction and sentence did not obviate the possibility that defense counsel could examine prospective jurors concerning their attitudes towards the "disparate sentencing" idea. In fact, this Honorable Court's attention is respectfully directed to the following portion of the voir dire examination conducted by defense counsel which conclusively demonstrates that defense counsel was, indeed, permitted to explore the question of "disparate sentencing":

* * *

MR. CULPEPPER: Do you believe the death penalty is warranted in all murder cases?

PROSPECTIVE JUROR ZEIMET: No, sir.

MR. CULPEPPER: Where there is more than one person involved in a crime, do you believe that there is some -- do you believe that they should receive equal punishment if they have equally been involved in the crime or are equally culpable?

PROSPECTIVE JUROR ZEIMET: I think each one has the right to their own trial.

MR. CULPEPPER: If someone was involved, and you were on the jury and you convicted him of a First Degree Murder charge, but you determined he was not the actual -- or not the one who actually committed the murder, could you give the death penalty in that circumstance?

MR. ALLWEISS: Your Honor, may we approach the Bench?

THE COURT: Yes, sir.

(THEREUPON, the following proceedings were held at the Bench:)

MR. ALLWEISS: Judge, I think it's highly improper for counsel to ask for a commitment from a juror without the juror hearing the facts. And that's what he's doing, giving the juror a hypothetical situation and asking how he or she would vote. And I think it's improper.

MR. CULPEPPER: Judge, Mr. Jordan gave a number of hypotheticals, not necessarily --

THE COURT: He told them what they were going to get instructed on. I think you can ask them without telling them what the facts are. I don't think you can tell them what the law is. But if you want to tell them generally what the law is and how it's going to be instructed and if they can follow it, that's okay. But their theory of the law is improper and also may embarrass them.

MR. CULPEPPER: I'll rephrase it.

(THEREUPON, the following proceedings were held in Open Court:)

MR. CULPEPPER: Mrs. Zeimet, again, if the situation arose where you found that someone -- in a capital phase -- was not the actual murderer and the Judge had charged you what the aggravating circumstances and what the mitigating circumstances were, and you listened to those and felt like, based upon this, and based upon your findings of the facts, he was not the actual murderer -- the one who committed the murder -- would you be willing -- would you be able to follow the guidelines that the Judge gives you concerning what the aggravating and mitigating circumstances are and make a decision concerning the death penalty -- whether or not to impose it?

PROSPECTIVE JUROR ZEIMET: I think I could follow the Judge's ruling.

* * *

(R 93 - 95)

Thus, it appears that without advising prospective jurors of any irrelevant and immaterial matters, defense counsel was still permitted to explore the venire persons' attitudes towards the concept of equal punishment for those equally culpable.

It should also be noted that the objection made by the state during the course of the excerpt set forth above was in accord with long-standing principles of Florida law. For example, in Dicks v. State, 83 Fla. 717, 93 So. 137 (1922), this Court stated:

> Prospective jurors are examined on their voir dire for the purpose of ascertaining if they are qualified to serve, and it is not

> proper to propound hypothetical questions purporting to embody testimony that is intended to be submitted, covering all or any aspects of the case, for the purpose of ascertaining from the juror how he will vote on such a state of the testimony. Such questions are improper, regardless of whether or not they correctly epitomize the testimony intended to be introduced.
>
> To propound to a juror a question purporting to contain an epitomy of the testimony subsequently to be introduced, and ask whether he would acquit or convict upon such testimony, would have the effect of ascertaining his verdict in advance of his hearing the sworn testimony of the witnesses.
>
> Such a procedure would revolutionize jury trial. (Text at 137)

Therefore, defense counsel was requested by the trial judge to simply rephrase the question in a form which would not call for the prospective juror to indicate how he would vote on a particular proposition. But, most importantly, defense counsel was not constrained by the granting of the motion in limine or by any other ruling of the trial court from examining prospective jurors on their attitudes toward the concept of "disparate sentencing".

The state, as well as the accused, is entitled to a fair trial. The purpose of the motion in limine was to keep from the jury any mention of matters which were clearly irrelevant and immaterial. Especially considering the fact that defense counsel was not precluded from examining prospective jurors concerning their attitudes towards the concept of equal sentences for those equally culpable, there is no issue presented herein upon which appellant can legitimately complain. This point must fail.

ISSUE II

WHETHER THE TRIAL COURT VALIDLY IMPOSED A DEATH SENTENCE UPON APPELLANT WHERE THE CODEFENDANT RECEIVED A SENTENCE OF LIFE IMPRISONEMENT.

As his next point on appeal, appellant contends that the jury purportedly indicated that the defendant was less culpable than a codefendant who was sentenced to life imprisonment by virtue of a question asked during deliberation and, therefore, the trial court erred by imposing a death penalty upon appellant, even in the face of an 8 - 4 vote to recommend the death penalty. For the reasons expressed below, appellant's point must fail.

The comparative culpability of appellant and his codefendant, Leon Illig, was a major factor in the trial of the instant cause. Because of this factor, appellant in his brief apparently believes that (1) Illig was the major participant in the homicide and, consequently, (2) it was error for the trial judge to impose a death sentence upon appellant where Illig entered a plea and received a sentence of life imprisonment. Both of these conclusions are completely refuted by the record and, therefore, the trial court validly imposed a sentence qf death upon appellant.

In an attempt to find fault with the proceedings below, appellant focuses upon the trial court's declination to answer a question propounded by the jury other than by rereading a portion of the standard jury instructions which advised the jury that deciding the verdict is exclusively its job and that the judge

cannot participate in that decision (R **762).** The jury asked two questions, one of which is not at issue in this appeal. The question asked by the jury which is at issue herein is as follows:

> "Is it unjust -- just to sentence the defendant to a greater sentence (death) than the accomplice, if based on the testimony **heard** by the jurors, the jurors believe that the defendant may have had a lesser part in the murder? (R **762)**"

It is significant to note that appellant concedes in his brief that the court's purpose in declining to answer the jury's question was so that the judge would "avoid substituting its conclusions of fact for those of the jury'' (Appellant's Brief at page 37). On this basis alone, the trial judge did not abuse his discretion. In Kelley v. State, **486** So.2d 578 (Fla. 1986), this Honorable Court held that "[t]he jury question here involved matters of fact, and this Court has held that a trial judge need answer only questions of law raised by jurors. *State v. Ratliff,* 329 So.2d 285 (Fla. **1976** ." The question in the instant case, although not a question purely of fact as was the question propounded by the jury in Kelley, is at the very least, a mixgd question of law and fact. Your appellee submits that it would be very difficult for the trial judge in the instant case to answer the propounded question without, in some fashion, commenting upon the evidence in the case. As mentioned above, the culpability of the defendant vis a vis the codefendant was a significant factor in the trial of this cause. Any comment by the trial judge in

attempting to formulate a response to the jury's question might force the court to reveal his feelings towards the facts underlying the question. For this reason, the trial court acted properly.

In any event, it must be observed that defense counsel, when informed of the jurors' question here at issue, specifically agreed with the trial court that rereading the instruction concerning nonparticipation by the court was the proper course of action (R 761). On the record, defense counsel stated that he explained the question to the defendant and also explained what the court's response would be (R 762). Thus, there is no question that the defense concurred with the court in the proper action to take in response to the jury's question. This is not surprising in that the tenor of the jury's question may have led the defendant and counsel to believe that the jury was already debating the significance of the codefendant's sentence of life imprisonment.

In State v. Ratliff, supra at 287, this Honorable Court observed that:

> . . . a criminal defendant is entitled to a fair trial by a jury which must consider the case upon the sworn testimony given from the witness stand and upon the instructions of the Judge *only* upon the law of the case. (emphasis in original)

The question propounded by the jury with respect to the relative culpability of the defendant and the codefendant was not a question only upon the law of the case. Rather, it involved a

substantial factual determination of who was the more culpable actor. The trial judge felt constrained not to comment upon the evidence so as not to hinder the jury's fact finding function. In his brief, appellant points to certain evidence adduced at trial which tended to, in his opinion, inculpate Illig as the principle actor in the homicide, to-wit: appellant's self-serving admissions to the police that he was there but Illig cut the victim's windpipe, and that no evidence of blood was found on appellant but Illig, after the homicide, went to a lake, removed his clothes, and attempted to hide them. However, other evidence was adduced which your appellee submits farmed the basis for the trial court's rejection of the notion that the codefendant Illig was the major participant in this crime. First, the fact that no blood was found on appellant is not determinative of the question who slashed the victim's throat. Rather, the evidence at trial was clear that the blood did not spurt out of the victim because the major vessels that were cut were too external jugular veins and blood flows out of these, rather than spurts (the testimany of Dr. Joan Wood, Medical Examiner, at R 373). In addition, the evidence clearly showed that there was much bload at the scene and it is certainly reasonable to conclude that Illig, if he was blood stained, could have rubbed against the walls or in some other fashion got blood upon his person.[1] Secondly, and most

[1] Testimony was adduced at the sentencing hearing before the trial judge concerning the investigation undertaken to determine whether in fact there was ever bload on Illig's clothes. Luminal testing was done and although there was an indication that there

importantly, appellant told several people that he, and not Illig, had cut the victim's throat (R 303; 310). These witnesses were appellant's cousin and brother. Also, Cindy La Flamboy, Illig's girlfriend, testified that Illig confronted defendant by striking him and stating that, "You didn't have to kill that man." (R 401) Ms. La Flamboy also observed the defendant *go* to the sink inside her home, take out his pocket knife and wash the blood off of it (R **402).** Thus, it can plainly be seen that there was a question of fact to be resolved as to who was the major participant in the crime. The trial judge did not wish to infringe upon the jury's fact finding duties and, therefore, the trial court did not abuse his discretion in handling the jury question the way he did.

Appellant cannot legitimately argue that the question of relative culpability of the defendant and the codefendant was not presented to the jury. This issue was discussed in closing argument by the state (R 729 - 730) and by defense counsel (R 738 - 748). In fact, defense counsel made the issue of relative culpability the feature of his closing argument (R 746 - 748). It certainly cannot be argued, therefore, that the jury was unable to consider the life sentence given to the codefendant as

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might be blood on the clothing, the laboratory experts advised that as long as the clothes had been in the lake for the period of time they were, it could not be determined whether blood was on the clothing if it was invisible to the eye (R **651 - 652, 653 - 654). In** addition, the shoes that appellant was wearing tested positive for human blood (R 655).

a mitigating circumstance in appellant's case. However, consideration of a codefendant's sentence, although a mitigating factor, see Slater v. State, 316 So.2d 539 (Fla. 1975), is not a dispositive issue. Rather, in order to fully explore the question of a codefendant's life sentence it would be necessary to delve way beyond the facts of the instant case in order to present the jury with the entire picture. Your appellee is unaware of any authority which permits consideration of matters outside the record by a jury during its recommendation deliberations in a capital case. As can be readily seen from the discussion immediately below, it would be necessary to advise the jury of much extra-record material in order to paint a clear picture of the circumstances surrounding the imposition of a life sentence in the codefendant's case.

The ultimate question to be resolved under this point is whether the trial court validly imposed a death sentence upon appellant where the codefendant received a sentence of life imprisonment. The factual findings of the trial court are well documented in the trial court's Findings in Support of Death Sentence (R 916). Your appellee submits, and as the trial judge found, appellant was the major actor in the instant homicide. Indeed, appellant made statements to his cousin and brother acknowledging the actual commission of the throat cutting. Additionally, other factors must be considered, and were considered by the trial judge, when determining the proper sentence to be imposed upon appellant. The trial judge validly

found three aggravating circumstances to apply to appellant in the instant case, to-wit: homicide committed while under sentence of imprisonment, the homicide was committed during the course of a robbery (and was also for pecuniary gain, a factor which merges into the robbery factor), and the homicide was especially heinous, atrocious and cruel. No mitigating circumstances were found by the trial judge. In contrast, an examination of the factors relevant to Illig's sentencing reveal that life imprisonment was warranted in his case. Illig was seventeen-years of age, a juvenile, at the time of the commission of the offenses. Additionally, Illig had no significant history of prior criminal activity. Also, as argued by the state at appellant's sentencing, Illig's role in the actual homicide was relatively minor and Illig acted under the substantial domination of Ragsdale (R 660 - 661). In addition, Illig would not have the "under sentence of imprisonment'' aggravating circumstance applicable in his case. Thus, when considering all of these factors (which are non-record in appellant's case), Illig received the punishment warranted by the circumstances, to-wit: life imprisonment. To the contrary, appellant, the more culpable actor in the homicide and at twenty-five years of age the more dominant figure, justly received the only punishment warranted in this case, a sentence of death.

ISSUES III - X

WHETHER THE TRIAL COURT ERRED BY DENYING VARIOUS MOTIONS TO DISMISS.

In his final eight points an appeal, appellant renews matters which were presented to the trial court via motions to dismiss. These issues all deal with the constitutionality of various provisions of Florida's death penalty statute and the application of them to appellant. In his brief, appellant candidly concedes that all of these points have been addressed by this Honorable Court and have been rejected. Rather than further burden an already overburdened Court, your appellee will not set forth scores of precedent where appellant has already conceded that his arguments have no merit. The type of claims raised by appellant have been presented to this Court before and have been consistently rejected by this Court. See e.g., Mendyk v. State, 545 So.2d 846 (Fla. 1989); Stano v. State, 460 So.2d 890 (Fla. 1984). Those constitutional issues which were raised in motions to declare §921.141 unconstitutional have been repeatedly rejected. See, e.g., Proffit v. Florida, 428 U.S. 242 (1976); Lightbourne v. State, 438 So.2d 380 (Fla. 1983); State v. Dixon, 283 So.2d 1 (Fla. 1973). This Honorable Court's recent opinions indicate that this Court continues to reject the constitutionality arguments. See, e.g., Carter v. State, 14 F.L.W. 525 (Fla. October 19, 1989). Appellant's points III - X should also be rejected.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the judgment and sentence of death imposed by the trial court should be affirmed by this Honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to William G. Dayton, Esq., P.O. Box 1883, Dade City, Florida 33525-1883, this 1st day of February, 1991.

OF COUNSEL FO APPELLEE.