IN THE SUPREME COURT OF FLORIDA

PAUL BEASLEY JOHNSON,

Appellant,

vs.

Case No. 72,694

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ALACHUA COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

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OTHER AUTHORITIES

STATEMENT OF THE CASE

Appellant will reply upon the Statement of the Case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his initial brief.

SUMMARY OF THE ARGUMENT

The authorities relied upon by Appellee arc distinguishable because, unlike the case at bar, the prospective jurors made affirmative verbal statements that they could not follow the law and the court's instructions. Moreover, Appellee has not acknowledged the State's burden to prove that challenged jurors are excludible for cause.

Although a defendant may not have a federal constitutional right to intelligent use of peremptory challenges, he does have a constitutional entitlement to whatever peremptory challenges that state law may grant him. Under decisions of this Court, a defendant must be allowed to question prospective jurors upon subjects such as pretrial publicity which might cause them to be biased against the defendant.

Authorities relied upon in Appellee's brief are distinguishable because in none of them did the State contrive a method to give the informant access to the suspect.

A recent decision from the Third District supports Appellant's argument that evidence of a prior criminal record cannot be used by the State to rebut the impaired capacity mitigating circumstance.

A law review article provides persuasive authority for Johnson's entitlement under the Florida Constitution to present allocution to the penalty jury.

Appellee erroneously contends that Appellant does not challenge the sentencing judge's finding of the cold, calculated and premeditated aggravating circumstance for all three of the homicides. Authorities relied upon by Appellee arc inapposite because in each of them, the defendant had targeted a specific victim. The trial court's refusal to find and weigh mitigating circumstances is reversible error.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY STRIKING PROSPECTIVE JURORS DANIELS AND BLAKELY FOR CAUSE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

Appellee contends that the case at bar is comparable to this Court's decisions in Mitchell v. State, 527 So.2d 179 (Fla. 1988) and Gunsby V. State, 574 So.2d 1085 (Fla. 1991). Brief of Appellee, p. 8-9. However, these decisions are readily distinguishable because the prospective jurors there made some sort of ver-

bal statement indicating inability to follow their oaths as jurors and the court's instructions.

In Mitchell, this Court termed the prosecutor's questioning "brief", but found ample support from the record of the jurors' responses to justify their excusal for cause. Similarly, in Cunsby, only prospective jurors who "affirmatively stated that they wauld be unable to discharge their duty as jurors" were excused. 574 So.2d at 1088. These circumstances are simply not comparable to the total absence of any verbal statement by the excused prospective jurors Daniels and Blakely at bar.

Moreover, Appellee fails to acknowledge that the State had the burden to show that the prospective jurors were excludible for cause. See, Wainwrisht v. Witt, 469 U.S. 412 at 423 (1985). Until such time as the State meets this initial burden, defense counsel has no duty to show that prospective jurors are not excludible for cause.

A raised hand in response to one question is an insufficient basis for the court's finding that prospective jurors Daniels and Blakely were excludible for cause.

ISSUE II

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO HAVE INDIVIDUAL VOIR DIRE OF PROSPECTIVE JURORS WHO ADMITTED TO HAVING READ PREJUDI-CIAL PRETRIAL PUBLICITY.

In Appellee's brief at p. 16-17, this Court's decision in Reilly v. State, 557 So.2d 1365 (Fla. 1990) is described as a

case involving "juror misconduct during the course of the trial." In fact, Reilly involved a prospective juror who was exposed to prejudicial pretrial publicity and who should have been excluded for cause on defense counsel's motion.

While Appellee correctly observes that Johnson is raising the same issue as that decided in Mu'Min v. Virginia, 111 S.Ct. 1899 (1991), this does not end the inquiry. The Mu'Min decision was grounded upon the lack of a federal constitutional entitlement to peremptory challenges. However, when a state court deprives a defendant of his entitlement to peremptory challenges as defined by state law, the defendant is also deprived of his rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment. Ross v. Oklahoma, 487 U.S. 81 (1988).

As Appellant painted out in his initial brief, Florida courts have traditionally required a meaningful voir dire inquiry into juror attitudes which might cause bias. Lavado v. State, 492 So.2d 1322 (Fla. 1986); Moore v. State, 525 So.2d 870 (Fla. 1988); Pope v. State, 84 Fla. 428, 94 So. 865 (1922). Accordingly, the trial court's denial of Johnson's request to individually voir dire the jurors who admitted exposure to pretrial publicity deprived Johnson of his right to an impartial jury under Article I, sections 9 and 16 of the Florida Constitution and the Fourteenth Amendment, United States Constitution.

ISSUE III

APPELLANT WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S REPEATED INTERJECTIONS AND REBUKES OF DEFENSE COUNSEL BEFORE THE JURY.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE IV

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS WHICH WERE OBTAINED BY JAILHOUSE INFORMANT JAMES LEON SMITH IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

Contrary to Appellee's argument, the switching of cells which left the infarmant Smith next to Johnson's cell is clear circumstantial evidence that the State deliberately sought to elicit incriminating admissions from Appellant. The cases cited by Appellee on pages 30-1 in her brief are readily distinguishable because in those, the State did not contrive a method to give the informant access to the suspect.

ISSUE V

THE TRIAL COURT ERRED BY ALLOWING STATE WITNESS JAMES SMITH TO TESTIFY ABOUT JOHNSON'S SPECULATION IF AN INSANITY DEFENSE WAS ACCEPTED BY THE JURY.

ISSUE VI

THE TRIAL COURT ERRED BY SUSTAINING THE STATE'S OBJECTION TO APPELLANT'S EXAMINATION OF ROY GALLEMORE IN REGARD TO HIS RECOMMENDATION CONTAINED IN THE PRE-SENTENCE INVESTIGATION OF INFORMANT AND KEY STATE WITNESS JAMES SMITH.

ISSUE VII

THE TRIAL COURT ERRED BY NOT PERMITTING TESTIMONY FROM DEFENSE WITNESS DWIGHT DONAHUE UNLESS APPELLANT WAIVED HIS ATTORNEY-CLIENT PRIVILEGE AND PROVIDED THE STATE WITH DISCOVERY OF PRIVILEGED COMMUNICATIONS.

ISSUE VIII

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY ON THE LIMITED USE OF COLLATERAL CRIME EVIDENCE.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE IX

THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO INTRODUCE JOHNSON'S PRIOR CRIMINAL RECORD WHILE CROSS-EXAMINING DEFENSE WITNESSES BECAUSE UNDER THE CIRCUMSTANCES IT HAD NO PROPER RELEVANCE AND CONSTITUTED A NONSTATUTORY AGGRAVATING FACTOR.

Contrary to Appellee's argument, the State's presentation of Johnson's prior criminal record was not proper rebuttal to the mitigating factor that Johnson's capacity to conform his conduct

to the requirements of law was substantially impaired at the time of these homicides. Recently, the Third District in Curtis v. State, Case No. 86-3117 (3d DCA October 29, 1991)[16 FLW D2755] found error where a defendant's prior convictions were introduced into evidence as rebuttal to a combined insanity/voluntary intoxication defense. The reasoning in Curtis is fully applicable to the misuse by the State of Johnson's prior criminal record to urge the penalty jury to return a death recommendation.

ISSUE X

THE TRIAL COURT ERRED BY REFUSING TO ADMIT APPELLANT'S PROFFERED ALLOCUTION INTO EVIDENCE BEFORE THE PENALTY JURY.

As additional authority for Johnson's right to present allocution to the penalty jury, this Court should consider a law review article, Sullivan, "The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation'', 15 New Mexico L.Rev. 41 (1985). The author argues for a constitutional basis in the New Mexico Constitution which fully corresponds to the "right to enjoy and defend life and liberty" language of Article I, section 2 af the Florida Constitution's declaration of "Basic Rights".

A capital defendant should be allowed to defend life by making a personal plea of regret to the jury which recommends penalty. The defendant's tone of voice and ability to develop a response within the jurors could be critical in whether the jury finds the evidence in mitigation to be credible. Cross-examina-

tion is not required because a plea for mercy does not advance or dispute facts.

Accordingly, the trial court's exclusion of Johnson's proferred videotape from evidence violated Article I, sections 2, 9 and 17 of the Florida Constitution and the Eighth and Fourteenth Amendments, United States Constitution.

ISSUE XI

THE SENTENCING JUDGE **ERRONEOUSLY** WEIGHED **IMPROPER** AGGRAVATING CIR-**CUMSTANCES** AND FAILED **TO** WEIGH ESTABLISHED MITIGATING CIRCUMSTANC-ES.

Appellee's brief erroneously contends under the "Cold, Calculated and Premeditated" section that "Appellant **does** not **appear** to be challenging this finding" with regard to "the murder of Deputy Burns [sic]". **Brief** of Appellee, p. 51. In fact, Appellant argued in his initial brief at **pages** 73-4 that the slaying of Deputy Theron Burnham was not cold, calculated and premeditated.

The cases cited by Appellee in her brief at **page** 50 are in-**apposite** to the **case** at bar because in each case, the defendant announced a prior intent to kill a specific victim. This is totally different than Appellant's alleged statement that he would shoot people if he **had** to in order to **rob** them.

This Court's finding in Johnson I [Johnson v. State, 438 So.2d **774** (Fla. 1983)] that the homicides were cold, calculated and premeditated is not conclusive at bar because this **Court's**

standard of review has changed for this aggravating circumstance. At the time of Johnson, I, a deliberate execution-style shooting qualified as cold, calculated and premeditated. See e.g., Herring v. State, 446 So.2d 1049 (Fla. 1984). However, since Rogers v. State, 511 So.2d 526 (Fla. 1987). this Court has required a careful prearranged plan to kill a specific individual in order to make the cold, calculated and premeditated aggravating circumstance applicable.

Appellee also argues that any errors in the sentencing judges's Consideration of aggravating and mitigating factors could not have affected the sentences imposed. However, the trial court's refusal to find and weigh mitigating evidence cannot be termed harmless. As this Court wrote in Cochran v. State, 547 So.2d 928 (Fla. 1989):

> Indeed, to suggest that death always is justified when a defendant previously has been convicted of murder is tantamount to saying that the judge need not consider the mitigating evidence at all in such instances. The United States Supreme Court consistently has overturned cases in which mitigating evidence was deliberately and directly ignored. (citations omitted)

547 So.2d at 933.

ISSUE XII

APPELLANT WAS DENIED HIS RIGHT TO PREPARATION OF THE ENTIRE RECORD OF THE CONVICTION AND SENTENCE FOR REVIEW BY THIS COURT.

Appellant will rely upon his argument as presented in his initial brief.

CONCLUSION

Appellant will rely upon his Conclusion as presented in his initial brief.

CERTIFICATE OF SERVICE;

I certify that a copy has been mailed to Assistant Attorney General Candance Sunderland, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 14th day of November, 1991.

Respectfully submitted,

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