0/a 2-9-89

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IN THE FLORIDA SUPREME COURT

CHARLES L. STOCKTON,

Petitioner,

v. CASE NUMBER: 72,921

STATE OF FLORIDA,

Respondent.

______________________/

BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was the Appellant below and will be referred to as petitioner. Respondent was the prosecution below and will be referred to as the State.

The one volume Record on Appeal will be referred to as "R" followed by the appropriate page in parenthesis. The transcript will be referred to as "T" followed by the appropriate page in parenthesis.

STATEMENT OF THE CASE AND FACTS

The Respondent hereby adopts the Statement of the Case and Facts as contained in petitioner's initial brief.

SUMMARY OF THE ARGUMENT

The thirty minute time limitation placed on closing argument did not unreasonably restrict or unfairly infringe upon the defendant's right to a fair trial. There is no hard and fast rule as to the amount of time to be afforded. Determination of what is reasonable is dependant upon the facts and circumstances of each case. Review of counsel's closing argument in conjunction with the allegation of what would have been argued with additional time does not reflect an abuse of judicial discretion.

It is not error for the trial judge to refuse to repeat the original jury instructions when the phrasing of the jury's request for reinstruction suggests a determination has already been made as to whether the homicide is lawful or unlawful. A jury's request for reinstruction as to the difference between second and third degree murder which results in reinstruction for second and third degree murder as well as manslaughter does not require that instruction also be given for justifiable and excusable homicide.

The reasons set forth by the trial court in support of a sentence above the presumptive guidelines recommendation are sufficiently clear and convincing to support the departure

sentence under State v. Mischler, No. 65,191 (Fla. April 3, 1986) [11 F.L.W. 139] and Albritton v. State, 476 So.2d 158, 160 (Fla. 1985).

ARGUMENT

Issue I

THE TRIAL COURT DID NOT ERR IN IMPOSING A THIRTY MINUTE TIME LIMIT ON PETITIONER'S CLOSING ARGUMENT.

In it's opinion, the majority of the lower tribunal found that the limitation of petitioner's closing argument to thirty minutes was not unreasonable and not reversible error. The majority opinion was correct.

The State does not dispute the general principle that reasonable time should be afforded for argument to the jury. May v. State, 89 Fla. 78,80-81, 103 So. 115, 116 (1925), Herring v. New York, 422 U.S. 853 (1975). However, setting the length of time for counsel's closing argument involves trial court discretion and many complex factors not ascertainable from the cold record on appeal. Joseph v. State, 479 So.2d 870, 871 (Fla. 5th DCA 1985) (J. Cowart, dissent). Consequently there is no "hard and fast rule" as to the amount of time which should be afforded. See, Hickey v. State, 484 So.2d 1271, 1273 (Fla. 5th DCA 1986).

Cases reversed because of unreasonable restrictions upon closing argument have involved quite different circumstances from those presented in this trial. In Joseph v. State, 10 minutes was afforded a defendant charged with burglary and grand theft;

the State was given 12 minutes. In Cain v. State, 481 So.2d 546 (Fla. 5th DCA 1986), the defendant, who endured a two day trial (not including jury selection) for two narcotic offenses which comprised 400 pages of transcript, was afforded 15 minutes. This "arbitrary" curtailment was premised upon the court's "need to run his courtroom." Id. at 546. In Hickey v. State, argument in a 4 day murder trial in which the transcript totaled 900 pages (the testimony comprised 750 pages) was limited to 30 minutes. In Neal v. State, 451 So.2d 1058, 1060 (Fla. 5th DCA 1984), 25 minutes of argument was deemed insufficient in a first degree murder trial raising a "novel and complex spouse abuse defense, combining theories of self-defense and temporary insanity." Id. In Rodriguez v. State, 472 So.2d 1294 (Fla. 5th DCA 1985), both parties requested 30 minutes, but only 15 minutes were afforded. Moreover the defense argument was cut off by the court when the allotted time had expired. Rodriguez was charged with burglary in a two day trial. In Stanley v. State, 453 So.2d 530 (Fla. 5th DCA 1984), only 10 minutes of argument was extended to a defendant charged with burglary and grand theft in a joint trial with two co-defendants. In Pittman v. State, 440 So.2d 657 (Fla. 1st DCA 1983), seven defendants charged with unlawful assembly were represented by the same attorney and tried together in a 4 day trial involving 33 witnesses. The transcript totaled 700

pages. Argument limited to 30 minutes was held unreasonable. In Foster v. State, 464 So.2d 1214 (Fla. 3d DCA 1984), argument was limited to 15 minutes following a 3 day armed robbery trial in which the trial court felt that defense had "very little to talk about." In May v. State, twenty minutes was afforded a defendant charged with assault to commit murder.

What amounts to reasonable time for argument is dependant upon the facts and circumstances of each case. Id at 115; Pittman at 658. A limitation of 30 minutes was not considered to be an abuse of judicial discretion in McDuffie v. State, 55 Fla. 125, 46 So. 721 (1908). Here the trial, excluding jury selection, lasted 2 days and comprised approximately 700 pages of transcript. Compare, Cain, Hickney, Rodriguez, Pittman, Foster.

Review of counsel's closing argument in conjunction with the allegations in brief concerning what could have been argued with additional time does not reflect major discrepancies. Id. at 19-20, 20-22; T 860-886. In fact, review of counsel's argument indicates comprehensive coverage of the evidence adduced at trial and the defense theory of the case. Although counsel initially objected to the limitation, the extensive argument and grounds asserted in brief were never presented. Counsel did not proffer the areas which would have been covered with additional time.

The State submits that an abuse of judicial discretion has not been established. Reversal is not required.

Issue II

THE TRIAL COURT DID NOT ERR IN REFUSING TO REINSTRUCT THE JURY ON JUSTIFIABLE AND EXCUSABLE HOMICIDE WHEN IT REINSTRUCTED ON MANSLAUGHTER.

In its opinion, the majority of the lower tribunal found that there was no need to reinstruct on justifiable and excusable homicide when reinstructing on the residual homicide offense of manslaughter. This decision was correct.

Petitioner was charged with second degree murder. Upon completion of trial, the jury was instructed on second degree murder, third degree murder, aggravated assault and manslaughter (T 904-910). The jury was also instructed in the justifiable use of deadly force (self defense) as well as justifiable and excusable homicide (T 910-913). After retiring and deliberating for approximately one and one half (1½) hours, the jury submitted the following written request:

> Please explain the difference between second and third degree murder again.

(T 926). The trial court repeated the entire instruction pertaining to unlawful homicide: second degree murder, aggravated assault and manslaughter. (T 927) The court felt "incumbent to at least give all the degrees if I give any of them." Id.

In discussing the jurors' request in this cause, counsel requested reinstruction on the lawful homicides of justifiable

and excusable homicide. (T 927) The State acknowledges the principle advanced in Hedges v. State, 172 So.2d 824 (Fla. 1965) and its progeny. However, this principle does not require reversal in the instant cause.

It is proper for a trial judge to limit the repetition of the charges to those specially requested by the jury as any additional instruction might heedlessly protract the proceedings. Hysler v. State, 85 Fla. 153, 95 So. 573 (Fla. 1923); Henry v. State, 359 So.2d 864 (Fla. 1978); Hedges v. State. The repetition of all the original instructions uopn a jury's request for additional instruction on a particular point is both exhausting and time consuming to all parties: the Court, the jury, the prosecution and the defense. In addition, the protracted proceedings may deter future jury requests when the trial court is restrained from providing clarifying supplemental instructions on particular issues. Henry v. State, at 867.

In Henry, the Florida Supreme Court affirmed a conviction where the trial court did not reinstruct upon all degrees of homicide, but simply complied with the specific request of the jury. The jury requested clarification on the difference between first and second degree murder and the trial court complied reasoning that reinstruction as to other degrees of homicide was both unnecessary and potentially confusing. Id. at 866.

Distinguishing Hedges, the Florida Supreme Court failed to find an abuse of discretion when reinstruction was limited to a direct response to the jury's specific request. Id. at 867.

This principle was noted previously by this Court in Kelsey v. State, 410 So.2d 988, 989 (Fla. 1st DCA 1982). Kelsey's conviction was reversed based on the jury's specific request: the "complete definition of manslaughter" which this Court reasoned required both excusable and justifiable homicide.

The phrasing of the instant request suggested the jury had already determined whether the homicide was lawful or unlawful. This determination is further evidenced by their need to continue deliberation only 16 minutes beyond reinstruction. Under such circumstances, petitioner was not entitled to reinstruction of lawful homicide. Henry v. State at 868; Hunter v. State, 378 So.2d 845, 847 (Fla. 1st DCA 1979). This precise point was addressed by the Florida Supreme Court. See, Henry at 868, n.2. See, Henry at 868, n.2. overruling Stills v. State, 272 So.2d 174 (Fla. 1st DCA 1973).

Prior to reinstructing, Judge Southwood court emphasized that repeating a portion of the total reinstruction should not placed any greater emphasis on the portion repeated. The jury was cautioned to take the repeated instruction in totality with the earlier instruction. (T 928) Following reinstruction, this was re-emphasized. (T 931-932, 928-931)

The jury retired at 10:00 p.m. and sixteen minutes later indicated its verdict. (T 932) Reversible error is not present. Retrial is not in order.

Issue III

THE TRIAL COURT DID NOT ERR IN IMPOSING A FORTY YEAR DEPARTURE SENTENCE BASED UPON THREE VALID REASONS FOR DEPARTURE.

The numerical computation on the guidelines scoresheet totaled 240 points. (R 98) Pursuant to the scoresheet, this point total carries a recommended guidelines range of 17 to 22 years imprisonment. A 40 year sentence was imposed and written sentencing order prepared by the trial court. (R 99-100)

It is well established that a judge is to be accorded wide discretion in determining an appropriate sentence. Wasman v. United States, ____ U.S. ____ 104 S.Ct. ____, 82 L.Ed. 2d 424 430 (1984). It was not intended that judicial discretion be usurped by the enactment of the sentencing guidelines. Hendrix v. State, 475 So.2d 1218 (Fla. 1985); Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984); Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984); Murphy v. State, 459 So.2d 337 (Fla. 5th DCA 1984).

As case law surrounding sentencing guidelines issues evolves, it is evident that appellate courts must look to the circumstances of an individual case in order to assess whether the sentence imposed was appropriate. Assessment has centered on whether the departure from the presumptive sentence was predicated on "clear and convincing reasons." Rule 3.701(d)(11), Fla.R.Crim.P. The Florida Supreme Court set forth the following

standard of review for sentences departing from the guidelines recommendation:

> An appellate court reviewing a departure sentence should look to the guidelines sentence, the extent of the departure, the reasons given for the departure, and the record to determine if the departure is reasonable.

Albritton v. State, 476 So.2d 158, 160 (Fla. 1985). The function of the appellate court is not to reevaluate the exercise of the trial court's discretion, but to determine whether there was an abuse of discretion.

In a more recent opinion, the Florida Supreme Court stated that to be "clear and convincing", reasons for departure must be credible and proven beyond a reasonable doubt and must be of such weight as to produce in the mind of the judge, a firm belief or conviction, without hesitancy, that departure is warranted. State v. Mischler, No. 66,191 (Fla. April 13, 1986) [10 F.L.W. 139, 140]. The court further defined the function of the appellate court in a guidelines case to be reviewed of the reasons given to support departure and determination as to whether the trial court abused its discretion in finding those reasons to be clear and convincing. Id. Justice Ehrlich suggests there are two hurdles for the clear and convincing test: validity of the reason cited and establishment of the reason

beyond a reasonable doubt from the facts of the case. Id. at 140-141 (specially concurring opinion). The State submits the grounds set forth as justification for the departure sentence in this case pass the "clear and convincing" test of Mischler.

The written sentencing order sets forth sufficient clear and convincing reasons to warrant departure from the presumptive sentence. (R 99-100, T 999-1001). The first ground discusses the inadequacy of the presumptive sentence. Although such a finding was valid when relied upon by the trial judge, subsequent case law has labeled similar findings a reflection of the trial court's disagreement with the Sentencing Guidelines Commission. Scurry v. State, No. 67,589 (Fla. June 5, 1986) [11 F.L.W. 254, 256]; Jefferson v. State, No. BI-38 (Fla. 1st DCA June 6, 1986) [11 F.L.W. 1276, 1277]. Deterrence to those persons within a specific community was overruled in Scurry v. State, at p. 256, and Santiago v. State, 478 So.2d 47 (Fla. 1985). Following imposition of petitioner's sentence, this Court has rejected a similar general deterrence finding. Cason v. State, 481 So.2d 1006 (Fla. 1st DCA 1986). The State submits however that when this ground is viewed in conjunction with Ground Three, infra, the finding is valid. See Also, T999-1001.

Ground Two relies upon petitioner's prior juvenile record for which the trial court deemed the presumptive sentence inadequate. (R 99) The scoresheet reflects only two second degree felonies were included in the scoresheet calculation. (R 98; but see T 986-988) Petitioner was on parole for residential burglaries at the time he committed the murder. Id., R 85 Petitioner's prior convictions were from California. (T 966-967)

Petitioner's California juvenile record indicates a pattern of escalating criminal acts dating from age eleven (11). (T 967-968, 969; R 72-84) Juvenile convictions which are unscored on the guidelines computation may support departure. Weems v. State, 469 So.2d 128 (Fla. 1985); Nixon v. State, No. BC-196 (Fla. 1st DCA June 4, 1986) [11 F.L.W. 1264]. This factor does not violate Hendrix v. State, 475 So.2d 1218 (Fla. 1985). Moreover, the instant record certainly supports an escalating pattern of criminality. Patty v. State, No. BP-260 (Fla. 1st DCA March 13, 1986) [11 F.L.W. 653]; Fablo v. State, No. 85-166 (Fla. 2d DCA May 23, 1986) [11 F.L.W. 1193, 1194]. The finding is both valid and supported by the record as required by State v. Mischler. Petitioner's initial brief omits reference to petitioner's re-sentencing where the California convictions were again discussed. (T 985-987)

The third ground addresses petitioner's possession of a firearm contrary to the conditions of his parole. (R 100) Petitioner challenges the finding as a departure based upon matters already factored into the presumptive sentence, citing Hendrix v. State, and as an inherent component of the offense. IB at 46-47. The State disagrees with petitioner's rationale.

Although the presumptive sentence was enhanced to a life felony because the jury found a firearm was used to commit the murder and the guidelines computation included points for petitioner's legal status (parole) at the time of the crime, the circumstances are separate from the trial court's finding. (R 100) The trial judge emphasized petitioner's "possession and ownership of the firearm" -- not the use of the firearm to commit murder -- as an "admitted violation of the terms of his California parole" Id. It was the use of the firearm in committing the murder which was factored into the presumptive sentence. Likewise it was the legal status, i.e. the fact that petitioner was on parole, which caused enhancement of the presumptive sentence. In the third factor, the trial court considered not these factors, but the petitioner knowingly and purposefully violated a condition of his parole without which "the murder would not have occurred." (R 100; T 999-1000)

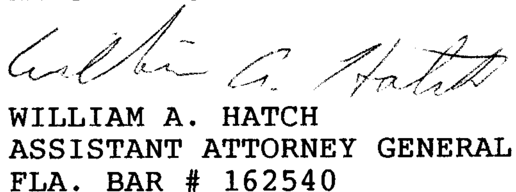
This third ground supports and explains the first factor concerning the sufficiency of the guidelines sentence in terms of retribution, deterrence, rehabilitation and for the safety of the public. (R 99-100) It also illustrates petitioner's "unamendability to rehabilitation" a finding which has been affirmed as a clear and convincing basis for departure. See, Ballard v. State, No. 85-455 (Fla. 4th DCA, May 21, 1986) [11 F.L.W. 1179]; Cassell v. State, No. 85-1469 (Fla. 2d DCA May 16, 1986) [11 F.L.W. 1161]. The record aptly demonstrates an escalating pattern of criminal conduct which was relied upon by the court. (T 999-1000) Thus the third factor set forth is substantially different from the manner in which the "firearm" and "parole status" was factored into the presumptive sentence. (T 999-1001)

The State submits that when viewed in conjunction all three factors are valid and are supported by the record. State v. Mischler. The departure sentence imposed should be affirmed.

CONCLUSION

Based on the foregoing argument and citations of authority, the petitioner's judgment and sentence should be affirmed.

Respectfully submitted,
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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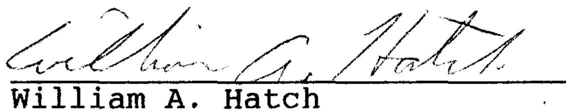
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Douglas P. Brinkmeyer, Assistant Public Defender, Tallahassee, Florida 32302, this 19 day of December, 1988.



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