IN THE SUPREME COURT OF FLORIDA

ANTHONY J. PONTICELLI,

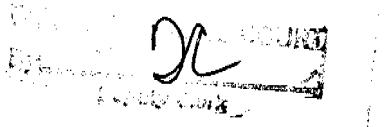
Defendant/Appellant,

vs.

STATE OF FLORIDA,

Plaintiff/Appellee.

CASE NO. 73,064



APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9,16,17 AND 22 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN FINDING APPELLANT TO BE COMPETENT TO STAND TRIAL.

Citing Muhammad v. State 494 So.2d 963, 372 (Fla. 1986), Appellee asserts that this Court has held that an unequivocal finding of competency by one expert is sufficient basis for finding an accused competent to stand trial. Unfortunately for Appellee this principle has no application to the instant case. Dr. Mills clearly found Appellant to be incompetent because he was censoring information and his feelings. (R1181-82) Appellant's "choice" not to cooperate with and assist his attorney was based on a psychotic process and resulted from Appellant not being oriented to reality. (R1185) While it is true that Appel-

lant rejected Dr. Mills full evaluation this case is distinguishable from Muhammad, supra, in that this rejection was not an intentional act designed to thwart the process by refusing to be examined. Rather, it most likely resulted from Appellant's religious preoccupation, i.e., his desire to leave his defense in the hands of God. (R1194-95)

While Dr. Poetter found Appellant to be competent, this finding was far from unequivocal. Dr. Poetter determined that Appellant was manifesting denial of the reality of the circumstances which was an inappropriate way of dealing with the stress he was experiencing. (R1197-98) Dr. Poetter stated that if Appellant received treatment and counselling not only could he overcome this denial but it would also provide time for Appellant's religious fervor to subside, (R1199)

Dr. Krop also found Appellant to be competent, but once again this finding cannot be considered unequivocal. Dr. Krop found Appellant to be manifesting denial and also to have an abnormal religious preoccupation.both of which were clearly interfering with his judgment. (R1211-1214)

It is important to note the time frame involved in the instant case. Appellant was indicted on January 4, 1988. (R1375-76) Appellant proceeded to jury trial just seven months later on August 9-12, 1988. Thus, if Appellant received the treatment which even the state's doctor stated would be beneficial, the delay in the proceedings would be minimal. Given the seriousness of the charges and the gravity of the penalty imposed the interests of justice dictated that Appellant be found incompetent to stand trial and receive needed treatment.

Finally, Appellee's citation to **Tibbs** v. State, *397* So.2d **1120** (Fla. 1981) for the proposition that review by this Court is limited to determining the sufficiency of the evidence is clearly inappropriate. **Tibbs**, supra, is concerned solely with the power of an appellate court to review a conviction. This Court ruled that the concern on appeal is the legal sufficiency of the evidence to support a verdict and judgment of guilt; no longer may an appellate court reverse a conviction based on the weight of the evidence. The issue of an accused's competence to stand trial **is** completely separate from the sufficiency of the evidence to support a conviction. Thus, **Tibbs** is inapplicable.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL AFTER A STATE WITNESS WAS PERMITTED TO TESTIFY AS TO POTENTIAL DANGER HE FACED AS A RESULT OF HIS TESTIMONY WHERE SUCH DANGER WAS NEVER CONNECTED TO APPELLANT.

Appellee argues that it was proper for the state to question its own witness (Freeman) concerning the potential danger he faced because of his testimony against Appellant as a method of "anticipatory rehabilitation". Such a contention *is* tenuous at best. In Bell v. State, 491 So.2d 537 (Fla. 1986) this Court approved the concept of anticipatory rehabilitation but limited it to situations involving the questioning of one's own witness with regard to prior inconsistent statements or prior convictions. Contrary to Appellee's assertion, it defies logic to extend the Bell holding to permit questioning one's own witness with regard to threats or danger. Appellee's reliance on Koon v. State, 513 So.2d 1253 (Fla. 1987) is misplaced.

In Koon the state was permitted to elicit information on cross-examination of a defense witness that the witness felt threatened as a result of conversations with the defendant's brother and an investigator from the office of the defendant's lawyer. There was no showing that the defendant was personally responsible for the threats. This Court found no error to the admission of this evidence and stated:

> At the outset, we note that the testimony was that it was outside the scope of direct examination. It has been held that evidence of threats made against witnesses is inadmissible to prove guilt unless the threats are shown to the attributable to the defendant. [citations omitted]. There is no indication in those cases that the evidence of the threats was introduced except as part of the state's case on direct or redirect examination. Here, however, the state was seeking to impeach the credibility of a defense witness on cross-examination as permitted by section 90.612(2), Florida Statutes (1985). The fact that. a witness has been threatened with respect to his testimony may bear on his credibility regardless of who made the threat. Therefore, there was a legitimate basis for the admission of the testimony.
>
> We are compelled to point out, however, that there are circumstances where testimony concerning third-party threats may properly be admissible under a recognized theory of evidence and yet be deemed so prejudicial as to require its exclusion.

Id. at 1255-56. In the instant case, unlike Koon, the evidence was elicited as part of the state's case-in-chief on direct examination of its own witness.

Appellee dismisses the argument that the state's "clarification" of its question raised the suggestion that appellant was perhaps "arranging" for other inmate to harm Freeman by suggesting that the omission of "an integral sentence" from the colloquy as reproduced in Appellant's initial brief was intentional. The omitted portion should read:

> Q. Mr. Freeman, you were telling the jury that you felt that you could possibly be in danger as a result of testifying here in court.

Danger from other inmates that you are currently housed with at the jail? [omitted sentence].

A. Yes, Ma'am.

(R715, emphasis added). Rather than being an intentional omission, it is this very sentence which raises the prospect that perhaps Appellant was enlisting the aid of other inmates to threaten Freeman.

Appellee's suggestion that even if it was error to permit the state to elicit this information it was harmless. However, Dennis Freeman was a crucial witness. It is through Freeman that the police learned of Keith Dotson and his cousins. Freeman also provided a map to Ron Halsey's house which led to the discovery of Appellant's burned clothes. The state has not even attempted *to* prove that "there is no reasonable possibility that the error [complained of] contributed to th conviction." State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986).

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND APTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT ADMITTED A PHOTOGRAPH OF THE VICTIM WHICH WAS CUMULATIVE TO OTHER PHOTOGRAPHS ALREADY IN EVIDENCE AND PERMITTED EXTENDED PUBLICATION OF PHOTOGRAPHS TO THE JURY.

Appellee disputes the contention that the photographs were posted on an easel and kept in continuous view of the jury. However, Appellant suggests that no other reasonable construction *is* possible in light of defense counsel's objection:

> I'm going to object to the continued exhibition. I know that those photographs have been published to the jury, but I think the continued exhibition of them is prejudicial for two reasons.
>
> Number one, clearly, especially photographs 4, 5 and 6, then I think 9, the ones that actually show the inside of the car and show the blood, and then show Ralph Gradinetti's body both of the car and then lying outside the car, are clearly admissible, admittedly, but I think continued exhibition of them is prejudicial and only serves to inflame the jury against Mr. Ponticelli.
>
> Secondly, I have noticed, especially since the photograph of Ralph on the ground has been put up, that several of the furors, during the time the testimony, has been taken, have been glancing up, paying more attention to that than to the testimony, and again, I think *it's* prejudicial and certainly is distracting to the jury. (R359-60 (emphasis added).

Obviously, the photos were being "put up" on something (like a bulletin board or an easel) which was drawing the juror's attention.

If this Court feels the record is unclear, Appellant suggests relinquishment to the trial court for the purpose of clarifying the record in this regard.

POINT X

IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE DEATH PENALTY STATUTE IS UNCONSTITUTIONAL BECAUSE SECTIONS 921.141(5)(h) AND (i), FLORIDA STATUTES (1987) ARE UNCONSTITUTIONALLY VAGUE AND APPLIED IN AN ARBITRARY AND CAPRICIOUS MANNER.

Appellee argues that Appellant's constitutional attack is procedurally barred due to the fact that no objection was raised in the trial court. This argument is incorrect for two reasons. First, the errors complained of are sentencing errors apparent on the face of the record for which no objection is required in order to raise them on appeal. State v. Whitfield, 487 So.2d 1045 (Fla. 1986). Second, the argument as presented alleges that the death penalty is unconstitutional because of the vacillating standard of review by this Court. Thus it would be inappropriate for a trial court to rule on the constitutionality of this Court's standards of review.

CONCLUSION

Based on the foregoing reasons and authorities, and those in the Initial Brief, Appellant respectfully requests this Honorable Court to grant the following relief:

As to Points I through VI, reverse his convictions and remand for a new trial;

As to Point VII, vacate his sentences and remand for resentencing with a new jury;

As to Points VIII, IX, and XI, vacate the sentence and remand for resentencing or reduce the sentences to life.

As to Points X and XII, declare the death penalty unconstitutional and reduce the sentence to life.

Respectfully submitted,

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PUBLIC DEFENDER
SEVENTH JUDICIAL **CIRCUIT**

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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, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Fla. 32014 and to Mr. Anthony Ponticelli, #112967, P.O. Box 747, Starke, Fla. 32091 on this 2d day of August 1989.

Michael S Becker

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER