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THE SUPREME COURT OF FLORIDA

CHARLES EDWARD CARTER)
)
Defendant, Appellant,)
)
vs.)
)
STATE OF FLORIDA)
)
Plaintiff, Appellee.)

SUPREME COURT CASE NO: 73,089

REPLY BRIEF OF APPELLANT

ON APPEAL FROM A FINAL ORDER
OF THE CIRCUIT COURT OF POLK COUNTY

September 18, 1989

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SUMMARY OF THE ARGUMENT

The mere fact that Johnny Johnson's credibility was in issue does not authorize the prosecutor to state his opinion that Johnson was telling the truth and to support his assertion with extra-record references to Johnson's trial and Johnson's attorney.

There has not been a finding beyond a reasonable doubt that Carter actually killed or intended the killing, and the trial court failed to follow the Jackson procedure for implementing Enmund to make such a finding.

There has been no finding by anyone that proof establishes beyond a reasonable doubt that aggravating circumstances exist.

The trial court erroneously stated that there was no evidence of certain statutory mitigating circumstances despite abundant testimony that the circumstances exist, and the court improperly found that the non-statutory mitigating circumstances were outweighed by aggravating circumstances.

ARGUMENT

ISSUES I, II, and III

The first three broad issues raised by Charles Carter are adequately addressed in the initial brief and the state's answer brief, with the exception of one sub-issue of Issue 11. At page 23 of the initial brief, Carter complained of the prosecutor's

improper vouching for the state's key witness. The prosecutor stated boldly in closing: "Johnny Johnson is telling you the truth." (R. 923). This comment must be reviewed in the context of the whole trial. The prosecutor also told the Carter jury that Johnny Johnson's jury got the same jury instructions (R. 896), that Johnson's confession was played at his own trial (R.24), that the same evidence, except for Johnson's testimony, was presented at Johnson's trial (R. 984), that twelve people were convinced of Johnson's guilt beyond a reasonable doubt (R. 984), and that Johnson's own lawyer knew that the truth would have convicted Johnson and the lawyer would not allow Johnson to testify falsely. (R. 992-93). In the context of those impermissible, extra-record statements, the prosecutor's remark that "Johnny Johnson is telling the truth" constitutes improper witness-vouching.

The state's answer brief, at page 7, yawns at this argument, blandly asserting that Johnson's credibility was in issue. Of course his credibility was in issue. But there is a proper way to argue his truthfulness and an improper way. The prosecutor chose not to address the credibility issue properly by pointing out evidence supporting Johnson's story. Instead, the prosecutor chose an improper method - - referring to evidence at Johnson's trial, referring to what Johnson's jury believed, and referring to what Johnson's lawyer believed. All of those references were to matters that were not introduced, could not be introduced, at Carter's trial. With all this

extra-record data before the jury, the prosecutor's comment that Johnson was telling the truth can only be seen as a statement of the prosecutor's personal belief based on information not properly before the jury.

Yes, Johnson's credibility was in issue. But the state committed reversible error in trying to convince the jury he was telling the truth.

IV

IMPOSITION OF THE DEATH PENALTY IS ILLEGAL UNDER THE CIRCUMSTANCES OF THIS CASE

- A. Imposition of the death penalty would violate Enmund v. Florida, Cabana v. Bullock, the Eighth Amendment and Article I, Section 17.

Under Enmund v. Florida, 458 U.S. 782 (1982), Carter cannot be sentenced to death because the case was submitted to the jury alternatively as a premeditated murder or as a felony murder, and the verdict reads ambiguously, "guilty as charged". There was no finding that Carter actually killed or intended the death of the victim. The state argues that Cabana v. Bullock, 474 U.S. 376 (1986), which authorizes a trial or appellate court to make the requisite Enmund finding, was satisfied because the trial judge found that Carter premeditated the killing. (Answer brief 12). The state relies on this Court's decision in Jackson v. State, 502 So.2d 409 (Fla. 1986), to bolster its Cabana argument.

The state's argument fails for two reasons:

1. A defendant is entitled under both the state and federal constitutions to have every element of an offense proven beyond a reasonable doubt. Likewise, a defendant cannot be sentenced to death because of an aggravating circumstance unless that circumstance was proven beyond a reasonable doubt. *Williams v. State*, 386 So.2d 538 (Fla. 1980). Surely, if a defendant's role in the actual killing is an essential fact which must be established to support the death penalty, that fact must be proven beyond a reasonable doubt. Here the trial judge said, in finding that the killing was cold, calculated, and premeditated, that "This circumstance is established by clear and convincing evidence..." (R. 1258). Because there was no finding beyond a reasonable doubt that Carter actually killed or intended to kill, the sentence must be reversed.

2. In *Jackson*, this Court established a procedure for trial courts to deal with the Enmund issue. The procedure requires the jury to be instructed that before recommending death, "the jury must first find that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be used." 502 So.2d at 413. The jury in this case was not so instructed (R. 209-14), and this Court is thus deprived of the jury's view on this matter. Furthermore, Jackson requires the trial court "to make an explicit written finding that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed, including the factual basis for the finding, in its

sentencing order." Id. The trial court's sentencing order does not remotely approach such an express finding. Instead, the trial court made only the assertion that clear and convincing evidence showed that "the crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner..." (R. 1258). (emphasis added) The evidence supporting this finding, according to the trial court, was that Carter (1) "told numerous lies...", (2) "intentionally planned to physically attack the victim...", (3) "influenced... Johnny Johnson to assist in the brutal physical attack," and (4) "revealed the said attack to his co-defendant prior to its occurrence." (R. 1258). The trial court did not expressly find that Carter killed or attempted to kill the victim. Nor did it expressly say that the terms "physically attack" or "brutal attack" indicated that Carter intended that a killing take place or that lethal force be used. The trial court's written order, therefore, does not comport with Jackson's requirements; consequently, the sentence must be reversed.

B. The trial court made inadequate findings of aggravating circumstances.

The jury recommended a life sentence without finding any aggravating circumstances. The trial court overrode the jury's recommendation, and found five aggravating circumstances. For each one, the trial court stated, "This circumstance is established by clear and convincing evidence that Defendant..." (R. 1256-58). In his initial brief (at 33), Carter argued that

this finding was inadequate because aggravating circumstances must be proven beyond a reasonable doubt. Williams, 386 So.2d at 542. The state's answer brief (at 13) dismisses Carter's argument as "semantical." The defendant's right not to be executed unless aggravating circumstances are proven beyond a reasonable doubt is far more than "semantical." The requirement is of constitutional proportions, it was not met in this case, and the sentence cannot stand.

C. None of the five aggravating circumstances found by the trial court may be relied upon for imposition of the death penalty in this case.

This issue is adequately addressed in the initial brief and the answer brief.

D. Jury override is improper under Tedder.

The state's answer brief mischaracterizes Carter's argument under Tedder v. State, 322 So.2d 908 (Fla. 1975), to be that the trial court's override of the jury's recommendation should be rejected "merely because the trial court did not specifically address appellant's evidence and argument" about mitigation. (Answer brief at 15). That is not Carter's argument.

The principle relied upon by Carter in his initial brief is that Tedder prohibits jury override unless the facts are so clear and convincing that virtually no reasonable person could differ. 322 So.2d at 910. The trial court stated that there was "no evidence" that the defendant was under the influence of extreme mental or emotional disturbance and that there was "no

evidence" that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The trial court's statement was erroneous. Carter included in appendices to his initial brief the testimony of a psychologist and a psychiatrist that contained abundant evidence of both a mental disturbance and an impaired mental capacity. Despite this evidence, the trial court said there was no evidence. The trial court did not "merely" fail to address the matter, it made a statement that was clearly and absolutely erroneous.

The trial court did indicate that it considered mitigating circumstances, but it did not say which ones, only that they were outweighed by the aggravating circumstances. (R. 1259). The state argues that the finding is sufficient under Brown v. State, 473 So.2d 1260, 1268 (Fla. 1985), which held that the trial court does not have to specifically address the mitigating circumstances. Surely, however, Brown does not allow the trial court to ignore evidence of mitigation, which is what the trial court did. There was ample evidence of the existence of the following mitigating circumstances:

1. influence of extreme mental or emotional disturbance;
2. substantially diminished capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;
3. life sentence for co-defendant;
4. defendant was victim of child abuse;

5. drug addiction;
6. organic brain damage;
7. diminished intelligence;
8. possibility of rehabilitation;
9. saving of a child's life.

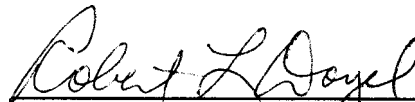
Because of the existence of these mitigating circumstances, it cannot be said that the facts supporting imposition of the death penalty are so clear and convincing that no reasonable person could differ. Accordingly, Tedder requires reversal.

CONCLUSION

The conviction should be reversed or, at least, the death sentence should be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished to Joseph Bryant, Assistant Attorney General, Park Trammell Building, 8th Floor, 1313 Tampa Street, Tampa, Florida 33602, by regular U.S. mail, this 18th day of September, 1989.



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