SUPREME COURT OF FLORIDA

CHARLES EDWARD CARTER, Appellant, **vs.** STATE OF FLORIDA, Appellee.	)	Supreme Court Case No. 73,089 Circuit Court No. CF87-4304 **(Polk)** Court Appointed

SUPPLEMENTAL BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF POLK COUNTY

December 14, 1989

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STATEMENT OF THE FACTS AND OF THE CASE

Appendix A to this brief contains a document captioned "Order Stating Aggravating Circumstances." At oral argument on December 8, 1989, counsel for appellant in another case, Darrell Wayne Hallman v. State, No. 70,761, described a similar document with the same caption. Both cases involve the same trial judge, and in both cases the trial judge used the "Order Stating Aggravating Circumstances" as a vehicle for overriding a jury's recommendation of a life sentence. Since oral argument on December 8, 1989, it has come to the attention of counsel for appellant that the same trial judge has also overridden a jury recommendation of life in Jeremy Lynn Scott v. State, No. 75,036, a case also now pending in this Court.

According to the concurring opinion of Justice Shaw in Grossman v. State, 525 So.2d 833, 851 (Fla. 1988) (Shaw, J., specially concurring), during 1984-85 there were 15 jury override cases resolved by this Court, and in 1986 and 1987, there were only 11 jury override cases resolved by this court. As indicated in the first paragraph of this statement of facts, there are presently three jury override cases pending in this Court on appeal from the same trial judge.

SUMMARY OF THE ARGUMENT

When a jury has recommended that a defendant receive a life sentence, the jury's recommendation cannot be overridden unless the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. The trial judge in this and at least two other cases has apparently misconstrued this standard of review. He improperly overrode the jury recommendation of life in this case upon (1) his own finding that aggravating circumstances were proven by clear and convincing evidence, and (2) his own view that mitigating circumstances did not outweigh the aggravating circumstances. In other words, he seems to have construed Tedder to authorize overrides if (1) aggravating circumstances have been proven by clear and convincing evidence, and (2) mitigating evidence does not outweigh the aggravating factors. He did not ascertain that **all** the facts suggesting death, not just the aggravating circumstances, were clear and convincing, and he did not determine that no reasonable person could disagree. Instead, he improperly substituted his own view of the weight of the evidence for the view expressed by the jury. Since there is evidence of mitigation upon which the jury could have based its recommendation, the jury override was improper, the death sentence should be vacated, and a life sentence should be imposed.

ARGUMENT

It is well settled that the trial judge must concur with a jury's life recommendation unless the facts suggesting a death sentence are so clear and convincing that virtually no reasonable person could differ. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The trial judge in this case recognized that the Tedder standard controlled his decision making, but he proceeded to apply a different standard.

In his "Order Stating Aggravating Circumstances," the trial judge found five aggravating circumstances to have been established by clear and convincing evidence. In each of the five paragraphs setting forth the aggravating circumstances, the judge expressly found that the circumstance was established by clear and convincing evidence. After the five numbered paragraphs, on page 3 of the order, the trial judge made this finding:

> These five aggravating circumstances are all supported by the evidence and facts of the case. The evidence is so clear and convincing that virtually no reasonable person could differ.

From this and all of the other references set forth above, and from the name of the order, itself, it is clear that the trial judge believed that his role was to find that the evidence of aggravating circumstances was so clear and convincing that

virtually no reasonable person could differ. That understanding of Tedder is inaccurate. In the first place, the Tedder standard does not permit imposition of a sentence of death solely because the trial judge determines that there is clear and convincing evidence of aggravating circumstances. The standard still remains that such circumstances must be proven beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). Furthermore, Tedder requires the trial judge to accept the jury's recommendation unless no reasonable person could differ with the judge's own conclusion that the death penalty should be imposed, not just that there are aggravating circumstances. Instead of applying that standard, however, the trial judge simply concluded that the evidence of aggravating circumstances was so clear and convincing that no reasonable person could differ with regard to the existence of the aggravating circumstances.

Having found clear and convincing proof of aggravating circumstances, the trial judge proceeded to ignore evidence in mitigation. Despite ample testimony from a psychiatrist and a psychologist (1) that the defendant suffered from the influence of extreme mental or emotional disturbance and (2) that the defendant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law were substantially impaired, the trial judge declared that there

was "no evidence" of either of these mitigating circumstances. (Order, pages 3 and 4). In effect, he totally ignored the mitigating evidence of expert witnesses presented on the defendant's behalf. He thus denied the defendant his constitutional right to have mitigating circumstances considered. Eddings v. Oklahoma, 455 U.S. 109 (1982); State v. Bolender, 503 So.2d 1247 (Fla. 1987).

Besides ignoring the statutory mitigating circumstances presented by the defendant, the trial judge asserted that non-statutory mitigating circumstances "do not outweigh the aggravating circumstances in this case." (Order, page 4). Quite obviously, the trial judge reweighed the mitigating circumstances against the aggravating circumstances and concluded in his own mind that, despite the non-statutory mitigating factors, the defendant should have received the death penalty. It is not the function of the trial judge under Tedder to reweigh the mitigation. This Court has established that "only when there are no valid mitigating factors discernible from the record upon which the jury could have based its recommendation is an override warranted." Fead v. State, 512 So.2d 176, 178 (Fla. 1987). Furthermore, it is not proper for a trial judge in overriding a jury's recommendation merely to substitute his view of the evidence and the weight to be given it for the jury's view. Holsworth v. State, 522 So.2d 348 (Fla.

1988). When there is some reasonable basis for the jury's recommendation of life, clearly it takes more than a difference of opinion for the judge to override that recommendation." Id. at 354.

It is apparent in this case that the trial judge substituted his view of the evidence for that of the jury. He totally ignored the statutory mitigating circumstances presented in the form of expert testimony. With regard to the non-statutory mitigating evidence, including brain damage, the potential for rehabilitation in prison, drug addiction, and a history of child abuse, the trial judge stated merely "these do not outweigh the aggravating circumstances." He did not determine if there was a reasonable basis upon which the jury could have recommended the life sentence. Obviously, therefore, he failed to apply the Tedder standard as outlined by this court in recent cases, and his override of the jury's recommendation cannot stand. The fact that the same judge now has three jury override cases pending in this Court, when only eleven jury recommendations were overridden in the whole state in a recent one to two year period, supports the appellant's argument that the trial judge is merely substituting his view for the jury's view because he has misconstrued his role under Tedder.

CONCLUSION

If the defendant's conviction for first degree murder is not reversed on the merits, the sentence of death should be vacated and a life sentence should be imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Joseph R. Bryant, Assistant Attorney General, Park Trammel Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, by U.S. mail, this 14 day of December, 1989.

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